This chapter will specifically address the question as to whether "original survey monuments set in the interior of a subdivision", that was created by simultaneous method, conclusively control the location of the lots and streets as originally monumented. Also, the question of the effect original monuments within a subdivision have on street width and location. The court cases and principles discussed throughout this chapter certainly may be applied in combinations with other cases and principles, beyond the scope of this chapter, for use in resolving other boundary situations. But, it is emphasized to the reader that understanding of the cases and principles recited herein is specifically designed to address these two questions asked.

These questions have existed in the past as evidenced by a great number of court cases in the late 1800's and early 1900's. There have been few cases in recent years because these early cases have firmly set forth the principles for analyzing these questions. The courts have addressed the issues at hand and there should be no controversy. But, the questions are still debated from time to time, and they need formal discussion.

A fact that must be clearly understood and accepted, is that there is not a measurement on earth that can be made with absolute certainty. Especially linear measurements over the land. No person on earth is capable of setting a monument exactly at a prespecified location, and no person is capable of exactly measuring from one existing monument to another, without a little blind luck. It is from this fact and from the fact that a monument is a very tangible thing where a measurement is not, that the courts have readily given the higher authority to monuments that actually exists rather than the measurements attempting to report their location.

Several legal concepts relate directly to the ability to resolve and understand these questions. The principles have been addressed by the courts and will be explained. It is emphasized that certain basic legal concepts must be understood to follow the more complex issues that will be discussed. It is recommended that the reader study as many texts on boundary principles books as possible in attempting to understand the issues at hand.

DESCRIPTION BY REFERENCE TO MAP OR PLAT

A deed which makes reference to a subdivision map, includes in all of its capacities, the referenced subdivision map. For example; when a simultaneous parcel is conveyed, the description is usually something like, "Lot 1, Block 1, TD's Acres, City of Tucson, Arizona". This description makes specific reference to TD's Acres in Tucson, Arizona. Hopefully there is only one TD's Acres in Tucson, and hopefully it is recorded. If there are two subdivisions with the same name, the theories discussed here will

not be invalidated, it will simply be a separate issue to determine which TD's Acres is under consideration. If the map is not recorded it does not necessarily mean that it is null and void, most jurisdictions give authority to unrecorded instruments between the parties that have knowledge of its existence. The one possible effect that an unrecorded plat may have with respect to the two questions at hand is that there may be no official dedication of the streets since the map is not of public record. If this is the case other legal principles may be required for interpretation, but the concepts that will be discussed here will most likely still apply. For convenience, assume that we are dealing with a duly recorded and approved subdivision map.

Arizona has a specific statute which addresses referencing a deed description to a separate recorded instrument. A.R.S. 11-482 is shown next in its entirety:

> **§ 11-482. Incorporation by reference; legal descriptions**
>
> A. Any recorded instrument may be incorporated by reference in any subsequent instrument. The reference shall specify the record location of the referenced instrument and has the same effect as if the referenced instrument were reproduced in full where reference to it is made.
>
> B. If a subsequent transaction is not to be subject to, controlled by or otherwise affected by every term of the referenced instrument, such intent must be stated. A reference to one term incorporates only that term.
>
> C. If a legal description sufficient to determine the physical location of real property has been recorded, a reference by record location to the instrument containing the description is a sufficient description of the real estate. The reference may be made to maps or plats, surveys, deeds or any other recorded instrument but must contain language indicating that only the legal description is to be incorporated in the subsequent instrument.

Including maps and plats with all deeds would make for cumbersome recordation and filing, cluttering up our clerk and recorders offices. This reference method has been a very convenient way of accomplishing the same thing. The following three cases best illustrate our courts' opininon with respect to reference to a map in a deed making the map a part of the deed itself:

"Whenever a deed describes property by reference to a plat or map, the grantor is considered as having adopted the plat or map as a part of the deed, and the grantee takes title in accordance with the boundaries so identified." Roetzel v. Rusch, 45 P.2d. 518.

"When lands described in a deed are by reference to or in accordance with a plat or survey, the courses, distances and other particulars appearing on the plat are to be as much regarded as if expressly set forth in the deed itself." (underlines added for emphasis), Bishop v. Johnson, Fla. 100 So. 2nd. 817.

"Each party recieved a deed which refers to a recorded plat or survey and there is no question but that the measurements, courses, and monuments shown on the recorded plat are incorporated in each deed by reference." (underlines added for emphasis), Sellman v. Schaaf, 299 NE. 2nd. 60.

"Furthermore, we find it to be the law that: "* * * whenever a deed describes property by reference to a plat or map, the grantor is considered as having adopted the plat or map as a part of the deed, and the grantee takes title in accordance with the boundaries so identified * * *". Wacker v. Price, 70 Ariz. 99, 216 P.2d. 707.

This case further states:

"We are bound by the best evidence rule which must be held to be the monuments established by the plat itself....". (underlines added for emphasis).

It is important to note is that the "monuments" and "other particulars" shown on the plat are incorporated within the deed, just as if they were specifically called for in the deed. The reference of the map in the deed operates to include all of the information on that map. With respect to a city or county, they typically do not get a deed for the streets and alleys because the streets and alleys are dedicated by the plat. They recieve the streets and alleys as shown by the plat. Usually the dedicatory language is something like:

"We, the owners of the lands herein described, do hereby dedicate to the public all rights-of-ways, easements, and streets as shown hereon." (underlines added for emphasis).

It is certainly clear that all of the "other particulars" and "monuments" shown on the plat are included within this dedicatory language since the language states "as shown hereon". It is always recommended that the dedicatory language be read and understood. Public dedications are subject to the same interpretations of the plat as deeds which make reference to the same plat.

AUTHORITY OF ORIGINAL SURVEY

Since the deeds and dedication clearly include all of the items and conditions shown on the plat, let's examine the authority given to monuments shown on the plat.
By definition, an original monument certainly includes a section corner, a one-quarter corner or other monument set by the government (GLO/BLM) surveyors in the original partition of the public lands. An original corner with respect to other land boundaries is a corner that was placed with intent of physically controlling any new land boundary. These monuments are usually

set prior to the sale of a piece of property which has as one of its boundaries the line represented by the monument placed. A survey done prior to subdivision of land is an original survey. The term applied to public lands surveys is exactly the same for any piece of property. The primary concept to understand is that the lines run and the monuments placed are the primary consideration and control over other criteria, such as dimensions.

"It is a well-settled rule of surveying, recognized by the courts, that the lines actually run control over maps, plats, or field notes." Pyburn v. Campbell, 250 S.W. 15.

"It is a well-recognized rule that the call for course and distance must ordinarily give way to a call for a corner which is fixed and determinable. Course and distance are of the lower grade of evidence, and will yield to a call in the grant or deed." Kendrick v. Johnson, 173 S.W. 914.

"There can be no question that the true boundary lines of lots are where they are actually run on the ground and marked by the monuments placed by the surveyor to indicate where they are to be found. " Wolpert v. City of Chicago, 117 N.E. 447.

"If these stakes, or either of them, represented the monuments erected as a part of the original survey, then we have a case of conflict and discrepancy between the monuments upon the ground, on the one hand, and the field notes and plat as recorded, on the other . In such a case the law seems to be well settled that the survey upon the ground as ascertained by monuments then made to mark the boundaries of the lots is controlling, and the paper plat and field notes must give way thereto." Tomlinson v. Golden, 138 NW 448. (numerous cases cited).

"Where there is a discrepancy between the survey and the plat, the survey controls, when it can be ascertained...." Olson v. City of Seattle, 71 P. 201.

THE RESURVEY

In resurvey work we continuously are told to "follow the footsteps" of the original surveyor. It is quite obvious from the authority given original monuments as why this is so. The courts have specifically addressed the issue of the resurvey as follows:

"The object of the rules for ascertaining of boundary lines is to determine where the line was originally in fact located by the surveyor, not where it should have been located." Kendrick v. Johnson, supra.

"In making a resurvey, the question is not where an entirely accurate survey would locate the lines, but where did the original survey locate such lines." Akin v. Godwin, 49 So. 2d. 604.

" "In surveying a tract of land according to a former plat or survey, the surveyor's only duty is to relocate, upon the best evidence obtainable, the course and lines at the same place where originally located by the first surveyor on the ground." " Wilson v. Giraud, 234 SW 384. (underlines added for emphasis).

"In cases deciding the boundary between two parcels of land, the law is settled that it is the duty of the surveyor to follow the original survey lines under which the property and neighboring properties are held notwithstanding inaccuracies or mistakes in the original survey. The purpose of this rule of law is that stability of boundary lines is more important than minor inaccuracies or mistakes." Froscher v. Fuchs, 130 So.2d. 300. (underlines added for emphasis).

"It is generally held, therefore, that a resurvey that changes lines and distances and purports to correct inaccuracies or mistakes in an old plat is not competent evidence of the true line fixed by the original plat." Akin v. Godwin, 49 So. 2nd. 604, supra.

"A resurvey not shown to have been based upon the original survey is inconclusive in determining boundaries, and will ordinarily yeild to a resurvey based upon known monuments and boundaries of the original survey." Pallas v. Dailey, 100 N.W.2d. 197.

"The court in the Ralston case, supra, further said: " 'The primary rules for locating city plats upon the ground are, in order of precedence in application, as follows: (1) Find the lines actually run and the corners and monuments actually established by the original survey. (2) Run lines from known, established or acknowledged corners or monuments of the original survey. (3) Run lines according to courses and distances marked on the plat.' " " Wacker v. Price, supra.

The case of Wacker v. Price, supra, also quotes from Diehl v. Zanger, 39 Mich. 601 as follows:

"....a resurvey, made after the disappearance of the monuments of the original survey, is for the purpose of determining where they were, and not where they should have been....".

Perhaps the most precise dictum concerning the high authority monuments have as controlling boundaries in a resurvey, is discussed in City of Racine v. J.I. Case Plow Co., 14 N.W. 599, where the court stated the rules of evidence to be resorted to in ascertaining the true bounaries are:

"First, the highest regard is had to natural boundaries; second, the lines actually run and corners actually marked on the ground at the time of the making of the plat and survey; third, the lines and courses of an adjoining lot or block, if called for or ascertained; and, forth, the courses and distances marked on the plat or survey"

RELIANCE

It has been shown that our courts say original monuments are most important in determining boundary lines, and original monuments should be found and perpetuated whenever possible. But close examination of the preceeding cases indicate that "it is generally held" that original monuments control, or that "course and distance must ordinarily give way to a call for a corner".

This raises a question as to when do original monuments not control? Again close examination of the cases clue us that once there has been "reliance" on the monuments they become fixed in physical location. There are instances where a corner is called for by mistake, such as a call for an adjoiner and a monument. In a case like this, the call for the adjoiner is held. This is not even the case with a subdivision. The key to the majority of situations is that there has been reliance on the called for monument. It is possible to have original monuments that have not been relied on. If there has been no reliance, then property rights are not necessarily vested to the monuments. If an error or inaccuracies are found before reliance or acceptance of monuments, it may be possible to make the appropriate corrections. Caution is advised before this is considered. These instances are probally rare and no court cases were specifically found addressing this issue.

As a general rule, reliance relates to the fact that a purchase has occured based on the fact that monuments existed at the time of purchase, or that they have been used in some way once they were discovered.

"Purchasers of town lots have a right to locate them according to the stakes which they find planted and recognized, and no subsequent survey can be allowed to unsettle their lines." (underlines added for emphasis) Chief Justice Cooley in Flynn v. Glenny, 17 N.W. 65.

"In Kaiser v. Dalto, 140 Cal. 167, 172, 73 P. 828, the court said that the survey as made in the field, and the lines as actually run on the surface of the earth at the time the blocks were surveyed and the plats filed must control; that the parties who own property have a right to rely upon such lines and monuments....". Arnold v. Hanson, 204 P. 2d. 97. (underlines added for emphasis).

"The original survey in all cases must, whenever possible, be retraced, since it cannot be disregarded or needlessly altered after property rights have been acquired in reliance upon it." Wilson v. Giraud, supra. (underlines added for emphasis).

"It is stated in 8 Am.Jur., Boundaries, p.787, section 59: "Purchasers of town lots generally have the right to locate their lot lines according to the stakes as actually set by the platter of the lots, and no subsequent survey can unsettle such lines. In event of a subsequent controversy the question becomes not whether the stakes were located with absolute accuracy, but whether they were planted by authority, and whether the lots were purchased and taken possession of in reliance upon them. If such was the case, the rule appears to be well established that they must govern notwithstanding any errors in locating them." " Dittrich v. Ubl, 13 N.W.2d. 384. (underlines added for emphasis).

The monuments may be controlling even though they have not actually been seen.

According to this next case of Anderson v. Richardson, 28 P. 679, the parties operated with the knowledge that a survey was done even though the monuments were not seen, the court said:

"Where monuments mentioned in a deed are identified, they control both courses and distances given, whether they were seen by the parties to the deed or not." (underlines added for emphasis).

The next two cases are where the parties actually did go into the field and look at monuments, and could not later attempt to assert the authority of the calls for course and distance:

"Appellants did not rely upon plats, maps or dedication when they bought Lot 4. They observed the ground, the streets that were marked and purchased the lot from what they observed on the ground. For that reason appellants are bound by the markers, lines and corners that existed on the ground." (underlines added for emphasis), Fulford v. Heath, 212 S.W. 2d. 649.

"....we are of the opinion that there is ample evidence in support of all the findings and conclusions of the lower court, as to plaintiffs' adverse possession of the property involved as well as proof of a sale by boundaries marked on the ground...." Hamilton v. McDaniel, 227 P. 2d. 755, 71 Ariz. 371.

Remember, in the case of a subdivision the monuments as described on the plat are as much a part of the deed as if independentally described. So from the forgoing cases we see that a purchase of land referring to monuments either directly by deed or by reference to a plat showing monuments, whether the monuments are actually seen or not, is in essence a purchase of land to the monuments. And no subsequent survey can unsettle those lines and corners.

WHICH CAME FIRST, THE SURVEY OR THE PLAT?

The question now comes up as to whether the plat or the survey came first. In other words, does the plat actually represent a survey or are the monument locations an attempt at representation of the plat?

Examine the next three cases:

"The plan is a picture, the survey the substance. The plan may be all wrong, but that does not matter if the actual survey can be shown." Susi v. Davis, 177 A. 610.

"The descriptions therefore embody, just as would a metes and bounds description, the monuments, courses and distances setforth in the plat to describe the actual land owned by each party. However, this description and this plat is a symbolic representation of something which has been physically marked out on the surface of the earth. The actual physical markings and location by monument or otherwise is the primary thing. It locates the land. The map or plat is secondary to this purporting to symbolically represent that which has been physically located." Sellman v. Schaaf, supra.

"Whenever it can be proved that [there was] a line actually run by the surveyor was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description [of the land] in the patent or deed." Cherry v. Slades Adm'r, supra.

It appears settled that when monuments are called for, the survey and the monuments are considered primary.

UNCALLED FOR MONUMENTS

Uncalled for monuments are of two types. Those that were actually in place at the time the plat was recorded but, not mentioned as "set" on the plat (or in the deed). The other type are those that were set shortly after the recordation of the plat (or delivery of the deed). With the first type of uncalled for monument it becomes matter of gathering evidence to support the fact that a survey was actually done. Knowing the design of certain surveyor's monuments will aid in this investigation.

It appears that if a survey was actually done, it will control. The situation that this would apply to is a subdivision that was laid out prior to recording of the plat(or sale of a lot), whether the monuments were specifically called for on the plat or not. The courts seem to consider the mere fact that monuments actually existed to be most important.

In the case of Wacker v. Price, supra, concurring Justice LaPrade states as follows with respect to monuments not established with "original status and authority":

"Bearing in mind that there is no evidence that an actual survey was ever made of Grand Avenue Subdivision or that any actual measurements were ever made from the Government monument at the intersection of 15th Avenue and McDowell Road and that our sole concern here is to determine if we can from the best evidence available what actually was the location of the lots in question as fixed by the plat of the Grand Avenue Subdivision, we are forced to the conclusion that their location is to be determined if at all from well-established long-standing monuments existing within the subdivision itself."

This case certainly covers monuments set after the plat or sale of a piece of property. It should be noted that a careful study of this case shows that an investigation was made as to whether an original survey had been done. Whether the monuments were called out on the plat or not was not the issue, simply whether an original survey was done. The following also addresses monuments set shortly after the plat is recorded (or deed is delivered). These monuments are sometimes controlling.

The case of Lerned v. Morell, 2 N.H. 197 states:

"Where a monument does not exist at the time a deed is made, and the parties afterwards fairly erect such a monument, with intent to conform to the deed, such monument will control."

The next three cases also reinforces this principle of uncalled for monuments controlling boundaries, and addresses monuments set subsequent to recordation of the plat or sale of a lot.

"Where a stone marked with plaintiff's initials was placed as a corner of the land at the time a survey was made, with the view and purpose of making the deed under which he claims, and the deed was made, intending to convey the land so surveyed, the stone will be the proper boundary, whether called for in the deed or not." Nelson v. Lineker, 90 S.E. 251.

"Whether monuments are erected upon the face of the earth by the mutual agreement of parties, and a deed is given intended to conform thereto, or whether they are subsequently erected by them with intent to conform to a deed already given, those monuments must control, notwithstanding they may embrace more or less land than is mentioned in the deed." (underlines added for emphasis), Bemis v. Bradley, 69 ALR 1399; Emery v. Fowler, 38 Me. 102.

"Monuments set by the original survey in the ground, and named or referred to in the plat, are the highest and best evidence. If there are none such, then stakes set by the surveyor to indicate corners of lots or blocks, or the lines of streets at the time, or soon thereafter, are the next best evidence." (underlines added for emphasis), City of Racine v. Emerson, 55 N.W. 177.

THE SURVEYOR REPRESENTS THE SUBDIVIDER

It is interesting to note that in today's practice where surveyors typically mark their points with their registration number, they are creating identical situations as that discussed in Nelson v. Lineker, supra. In other words, the surveyor's monument is the monument of the subdivider further evidenced by the following:

"These rules of construction are designed to carry out the intention of the parties. The intention of the parties is considered to be essentially the same as that of the surveyor." United States v. Champion Papers, Inc., 361 Fed. Supp. 481.

Also with respect to the subdivider's intent being the same as that of the surveyor's, see Wolpert v. City of Chicago (infra), where the court states:

"The purchasers of the lots in a subdivision, and the city, are bound by the monuments erected by the surveyor who laid out the plat and made the subdivision under the direction of the owner." (underlines added for emphasis).

ANALYSIS

With respect to uncalled for monuments establishing the actual lot boundaries, it is always important to confirm some type of reliance of the monuments by the parties, either constructively through purchase, by affirming the fact the parties had knowledge the monuments actually existed, or by showing an acceptance of the monuments by use or acknowledgement after purchase. These become matters of evidence and shows the importance of gathering parol evidence and doing thorough research.

Another situation is where monuments are called out on the plat as "to be set at a later date". Consider proper analysis with respect to the preceeding cases and as follows; purchasers and the city or county see this statement upon the face of the plat and right from the start see that monuments are going to be set at their lot corners. Purchasers of the lots operate in good faith throughout the process of purchasing the lot and then just before they close on the property, the lot corners get set. At this point in time the monuments are in fact in the ground at the time of conveyance. The landowners now move in, find the monuments and accept them. This clearly establishes the authority of the monuments with respect to the lot owners. Even if the surveyor who prepared the plat does not actually set the monuments, the fact that the subdivider hired a surveyor to set monuments for the completion of that portion of the contract(that "monuments will be set") represent the intent of the subdivider. The authority these monuments have with respect to the city or county would depend upon the actions of the city or county with regards to 'certificates of occupation' and subsequent maintenance of the streets.

One last situation where these cases and principles may apply, is where the subdivision plat shows no interior lot points as "set" or "to be set" and monuments are in fact not set prior to the recordation of the plat. The subdivider later hires either the surveyor who prepares the plat or another qualified surveyor to set the monuments for the lots. These monuments are sometimes referred to as "first monuments". In application of the cases discussed, we see that the surveyor "soon thereafter" (City of Racine v. Emerson, supra, page 7) the recording of the plat or sale of any lot and "with intent to conform" (Bemis v. Bradely, supra, page 7), sets the lot corners. Again, it is quite possible these monuments are in the ground at the time the lot is actually sold, whereby they certainly would be binding upon the lot owners. A controlling factor certainly is whether the monuments are subsequently relied on or accepted. Alot of discussion amongst surveyors will raise the "positional tolerance" issue but, if these forgoing boundary principles and

court cases are applied the accuracy of these "first monuments" is not the criteria to judge the acceptance of the monuments. Their legal authority may be established by the parties' "reliance and acceptance" of them.

With regards to monuments that clearly were in place at the time the plat was recorded, those monuments will almost always be binding. Seldom will you find lot owners moving into their new homes and imediately questioning the locations of boundary monuments and ordering a new survey. The purchasers and the city or county cannot be expected to verify the monments they find. The court in City of Racine v. J.I. Case Plow Co., supra, states as follows:

"The early settlers, who first buy and build upon the lots, do not attempt to ascertain their lines by a computation of measurements of all other lots and blocks by the figures on the plat, or stated in the certificate of survey, or the courses and distances marked thereon, or by a resurvey from the starting point of the first one. But they consult the stakes, and other monuments and land-marks, either natural or artificial, fixed and placed at he time of the original survey...".

Again, with respect to the city or county in all of this, consider the fact that the city or county accepts the plat with all of the "other particulars" shown and then issues building permits and certificates of occupancy to the dwellings. After the houses are completed the city or county then begins maintenance of the streets. By this time it cetainly consitutes an acceptance of the physical conditions of the street lines and then cannot be altered.

The following principles with respect to monuments on the interior of a simultaneous subdivision are developed from the forgoing analysis of the stated cases and principles:

1) Monuments specifically called for on the plat establish the boundaries of the lots, blocks and streets.

2) Monuments not called for on the plat but, that were actually in place at the time the plat was recorded or before the sale of a lot, will control the boundaries if the parties had knowledge of the existence of the monuments, or relied on the monuments after purchase.

3) Monuments called for on the plat "to be set" at some later date, will control the boundaries if relied on or accepted by all affected parties after the monuments have been placed.

4) Monuments not called for on the plat, that were placed with intent to conform to the plat but, were placed shortly after the recordation of the plat or sale of a lot, will control boundaries if the monuments were relied on or accepted by all affected parties.

In all of the four principles outlined, the monuments may or may not be those established by the surveyor who prepared the plat. The common important considerations are whether the monuments were set by the developer(a surveyor hired by the developer) and whether the monuments were relied upon or accepted.

INTENT

Now we can examine how these principles apply to the lot boundaries on the platted street right-of-way lines. Sometimes the argument that the original street monuments should not control the width of the streets because "it was the intent of the subdivider to give" a pre-specified width. This is not a correct statement. It is agreed that the intentions of the parties will always control over any other condition (in the absence of fraud), but that arguement does not apply in the case of dedicated streets in a subdivision created by simultaneous method, that are monumented. The cases researched for this chapter that discuss intent of the parties, usually talk about whether area controls, or whether a call to an adjoiner controls. The question of intent is most often associated with discrepancies within the actual writings of the deed itself. In other words, if there is a problem of associating the writings in the deed to the ground because of unclear words then an inquiry to the intent of the parties will be consisered. The courts reinforce their determination to keep the consideration of the intent of the parties within the workings of the deed itself by being reluctant to consider parol evidence to change the writings of the deed. The following cases address intent:

"While a deed should be construed in accordance with the intention of the parties, if at all possible, still such intent must be ascertained from the language of the instrument itself." Midkiff v. Castle and Cooke, Inc., 368 P.2nd. 887.

"There is no inconsistency on the face of the instrument and the description can be related to the land. Therefore parol evidence should not have been admitted. "Extrinsic evidence is admitted to resolve ambiguities, not to create them . McNeil v. Attaway, 348 P.2nd. 305."" LeBaron v. Crismon, 412 P.2nd. 705.

With the courts desire to make boundaries stable and keeping the intent of the parties relative to the writings of the deed comes the understanding that the act of setting a monument most clearly shows the intent:

"Courts should ascertain and carry out the intention of the original platters. In case of discrepancy, however, between lines actually marked or surveyed on the ground and lines called for by plats, maps or field notes, the lines marked by the survey on the ground prevail." Stewart v. Hoffman, 309 P.2nd. 553; Staaf v. Bilder, 415 P.2nd. 650.

"The question was not what Napier intended to do but what he did by his solemn act and deed." Ball Creek Coal Co. v. Napier, 202 SW 2nd. 728.

"The intention of one who has platted land into lots and blocks is indicated by the monuments which he has caused to be placed, marking the boundaries of the same, and another has the right to purchase from him with reference thereto, and such monuments and boundaries cannot be changed by showing that they do not conform to a plat on file. Lots in cities and towns are not held by such a precarious tenure." Olson v. City of Seattle, supra. (underlines added for emphasis).

At this point it has been shown that: (1) measurements are not exact; (2) monuments set before the plat was recorded or before a lot was sold, or monuments set shortly after the plat was recorded or a lot was sold, will generally prevail, most certainly after they have been accepted or relied on in any way; (3) the intention of the subdivider is the same as the intention of the surveyor (4) the intent of the parties is most clearly shown by what is marked on the ground, by their acts and; (5) reliance upon a monument establishes a high legal authority of that monument.

CONCLUSION

With these principles in mind, the direct question of where street rights-of-way lines truly exist can be answered. Are the lines at the platted dimension or where represented by monuments? This is answered in several cases. A very clear dictum is issued in Wolpert v. City of Chicago, supra, and many other cases which cite this case, as follows:

"The owner of a tract of land has a right to manage and dispose of it as he sees proper, subject to the laws of the state, and he can subdivide it into lots, streets, and alleys and locate them where he sees fit. The survey fixing the boundaries of the lots, streets, and alleys is the original work, as the plat is made from it and intended to be a faithful representation of it. The city can only take title to the street, as it is surveyed, in trust for the public. The purchasers of the lots in a subdivision, and the city, are bound by the monuments erected by the surveyor who laid out the plat and made the subdivision under the direction of the owner." (underlines added for emphasis).

One last case involving an alley which was dedicated per a plat, laid out seven feet out of place, and then subsequently used as staked, the court found:

"A call for an alley is a call for an alley as located and marked, and not as platted." City of Dallas v. Schawe, 12 SW. 2nd., 1074.

It should be noted that several cases researched for this chapter discussed the fact that a platted dedication of a street or alley merely establishes the "existence" of a street.

One last arguement to the forgoing conclusions is occasionaly suggested. That is, the right-of-way is the first conveyance out of the simultaneous creations shown by the plat and therefore senior in nature having higher authority than original monuments.

The very nature of a simultaneous conveyance is that it has no seniority to any other part created at the same time. A subdivision plat creates all of the parts equally and at the same time when it is recorded. This is based on the fact that one survey created the subdivision and only can two surveys conducted at different times can be subordinate to each other. The case of Adams v. Wilson, 34 So. 831 states as follows:

" "Where a tract of land is subdivided, and is subsequently found to contain either more or less than the aggregate amount called for in the surveys of the tracts within it, the proper course is to apportion the excess or deficiency among the several tracts. If, however, the original tract is subdivided by distinct and separate surveys, the second survey is subservient to the first, and must bear any susequently discovered deficiency."

It is quite clear that to consider a recorded and platted subdivision anything but only one survey, we would also be throwing turmoil into the well settled rule of law for proportionate measure in a subdivision.

When a plat that purports to dedicate right-of-way to the public is shown on a subdivision map, it is only one of the many parcels of land that is created equal. At the very instant in time that the plat is recorded, the title passes to the city or county. This is not a senior conveyance, merely the first parcel that changes ownership, with equal standing.

No cases were found during the research for this paper that would suggest the streets to have senior rights over original monumentation, and to consider the streets as a senior conveyance over monumentation would defeat the theory behind a simultaneous conveyance, not to mention the case law presented herein.

This author clearly recognizes that senior rights is of a higher element of evidence over original monuments in resolving boundary disputes, but this clearly is not the case here. If it is subsequently determined that original monuments are "lost" and reestablishment of the boundaries must be by proportionate measure, it appears that the general rule is that the streets and alleys then get the full width and the remaining excess or deficiency is distrubuted to the lots.

From all of the forgoing analysis it should be very apparent that within a subdivision, monuments set prior to recordation of a plat or set prior to a sale of a lot will control the lots and street rights-of-way lines. Also, it is highly likely that monuments set shortly after the plat is recorded or lot is sold (called for by plat or not) will control once accepted. Circumstances vary in determining what constitutes acceptance. The acts of the affected parties will be evidence to consider. Use by other surveyors in the area is important. And of course the acts by the city or county, supra.

OLSON et ux. v. CITY OF SEATTLE et al.

(Supreme Court of Washington. Jan. 10, 1903.)

MUNICIPAL CORPORATIONS — CONSTRUCTION OF STREETS — INJUNCTION — INTEREST OF OWNER—EMINENT DOMAIN—RIGHT TO DAMAGES—VARIANCE—INJUNCTION — VARIANCE BETWEEN SURVEY AND PLAT—EFFECT.

1. Where plaintiff held exclusive possession of real estate under contract to purchase, and had paid a substantial portion of the price, he had a sufficient interest to entitle him to compensation before it could be taken for the construction of a street thereon, and therefore a sufficient interest to entitle him to maintain injunction against the city and its contractor to restrain a trespass thereon until condemnation proceedings had been had and damages paid or tendered.

2. A property owner's right to compensation for property taken or damaged in the construction of a street thereon is not affected by the fact that his interest is less than the whole, so long as it is substantial and the taking of the property affects such interest.

3. Where plaintiff in an action for trespass to property alleged ownership in fee, the fact that the proof showed an equitable interest in the property, only, was not a fatal variance, when not raised in the trial court.

4. Where there is a variance between the survey of a city addition and the plat of the survey as recorded, and the survey is ascertained by monuments marking the boundaries of the lots on the ground, the survey controls the plat.

Appeal from superior court, King county; Geo. Meade Emory, Judge.

Suit by Martin Olson and wife against the city of Seattle and another to restrain the improvement of a street. From a judgment enjoining interference with plaintiffs' property until condemnation proceedings had been had, and damages assessed and paid or tendered, the city appeals. Affirmed.

M. Gilliam and Wm. Parmerlee, for appellant. S. S. Langland, for respondents.

FULLERTON, J. In March, 1888, Harry White and his wife, Anna, being then the owners in fee of certain real property situated in King county, platted the same into lots, blocks, streets, and alleys, and caused a plat thereof to be made out and duly recorded in the auditor's office of King county, under the name of the "Second Motor Line Addition to the City of Seattle." Prior to the filing of the plat the land was regularly surveyed, and the several lots, blocks, streets, and alleys into which it was divided were marked upon the ground by posts or stakes driven at the several corners thereof. Certain of these lots, among which were the lots in question in this action, as actually surveyed and marked on the ground, did not conform to the recorded plat; that is to say, the lots in question, as actually surveyed, extended 30 feet farther west than the recorded plat showed them to extend, taking up that much of a street appearing upon the plat under the name of "Fremont Avenue." No part of the lots as surveyed was ever opened to the public, or recognized by the persons making the plat as part of the street. The makers of the plat, on the contrary, maintained exclusive possession of the lots as surveyed and marked on the ground until they parted with such possession to their grantees, and such grantees and their successors in interest have maintained a similar possession ever since. At the time the land was platted, it was outside of the city limits of the city of Seattle, but in 1895 the city's boundaries were extended so as to include the property. In early part of the year 1902 the corporate authorities of the city ordered Fremont avenue to be graded and otherwise improved according to certain plans prepared by the city engineer. These plans were made on the assumption that the street was as it appeared upon the recorded plat, and the contemplated improvements required the opening of the street to the full width shown upon such plat. A contract for that purpose was let to the defendant George Cessna. The contractor entered upon the performance of the work and proceeded therewith until he reached the lots in question, and was proceeding to tear down the respondents' fence, and to enter upon so much of the lots as the recorded plat showed to be in the street, when this action was instituted against him to enjoin him from so doing. The city of Seattle was made a party defendant to the action, under proper averments, and alone defended. The trial resulted in a finding that the respondents were the owners of the lots as actually surveyed and marked upon the ground, and in a judgment enjoining the defendants from interfering therewith until condemnation proceedings were had, and the damages of the respondents ascertained and paid or tendered. The city appeals.

In their complaint the respondents alleged that they were the owners in fee of the property. Their proofs showed that at the commencement of the action they were in the exclusive possession of the property, holding under contracts of purchase on which they had paid substantially all of the purchase price; that prior to the trial the purchase price necessary to entitle them to deeds had been fully paid as to all of the property; that for two of the four lots in question the deed had actually been delivered, and for the other two there was simply a delay in its transmission. The appellant questions the right of the respondents to maintain an action of injunction upon this showing, contending—First, that they have no such interest in the property as entitled them to maintain an action of injunction; and, second, that there is a fatal variance between their pleading and proofs.

As to the first objection, we think there can be no question as to right of respondent to maintain the action. The right of possession alone of real property is a sufficient interest therein to enable a person having such right to invoke the remedies provided by law against a trespasser thereon; and one holding real property under contract of purchase with the owner, and who has paid a substantial portion of the purchase price, has

such an interest therein as will entitle him to compensation before the property can be taken or damaged for a public use. His right to compensation is not affected by the fact that his interest is less than the whole, so long as it is substantial, and the taking of the property affects that interest. That injunction is the proper remedy in a case where the public authorities seek to take private property for a public use without first making compensation therefor was determined in this court in Brown v. City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, and has been followed in practice ever since. See State v. Superior Court of King Co., 26 Wash. 278, 66 Pac. 385; Seattle Transfer Co. v. City of Seattle, 27 Wash. 520, 68 Pac. 90. There is nothing in the case of Colby v. City of Spokane, 12 Wash. 690, 42 Pac. 112, that is contrary to this principle. The court there was discussing the sufficiency of the evidence to establish ownership, and not the character of ownership necessary to maintain the action.

As to the second objection, it may be that the respondents were not entitled to prove the interest shown under an allegation of ownership in fee, and that there was a variance between the pleadings and proof. It is not, however, fatal to their right of recovery. Had the question been raised and sustained in the court below, the respondents would have been entitled to amend so as to make their complaint correspond with their proofs, but the question was tried as if there was no variance. This court will therefore treat the complaint as amended, and determine the respondents' rights upon the facts proven.

The appellant assumes that, where there is a lack of uniformity between the survey as actually made upon the ground and the recorded plat of such survey, the plat, and not the actual survey, controls, and hence in this case that the respondents' title must depend upon adverse possession; and a large space in its brief is devoted to an argument tending to show that title to a street or alley dedicated to public use cannot be acquired by adverse possession. But the rule is not as the appellant assumes it to be. Where there is a discrepancy between the survey and the plat, the survey controls, when it can be ascertained, and the proof here is overwhelming that the boundaries of the lots as claimed by and in possession of the respondents are in exact accord with the original survey. The intention of one who has platted land into lots and blocks is indicated by the monuments which he has caused to be placed, marking the boundaries of the same, and another has a right to purchase from him with reference thereto, and such monuments and boundaries cannot be changed by showing that they do not conform to a plat on file. Lots in cities and towns are not held by such a precarious tenure. Root v. Town of Cincinnati, 87 Iowa, 203, 54 N. W. 206; City of Racine v. J. I. Case Plow Co., 56 Wis. 539, 14 N. W. 599; Holst v. Streitz, 16 Neb. 249, 20 N. W. 307; Burke v. McCowen, 115 Cal. 481, 47 Pac. 367; Fleischfresser v. Schmidt, 41 Wis. 223.

This view of the case renders it unnecessary to discuss the question of adverse possession.

The judgment appealed from is affirmed.

REAVIS, C. J., and DUNBAR, ANDERS, and MOUNT, JJ., concur.

TOMLINSON v. GOLDEN et ux.

(Supreme Court of Iowa. Nov. 16, 1912.)

1. BOUNDARIES (§ 3*)—MONUMENTS—FIELD NOTES—CONFLICTS.

Where there is a conflict between monuments erected on the ground as a part of the original survey and the field notes and plat as recorded, the survey on the ground as ascertained by the monuments marks the boundaries, and is controlling.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3–41; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*)—"MONUMENTS"—FIELD NOTES—CONFLICTS.

The engineer making an original survey of a tract into lots, blocks, and streets set stakes on the ground to indicate boundaries of lots. He made a resurvey from his original notes, and discovered a discrepancy between the stakes and the field notes. In placing the stakes originally, he intended to place them in accordance with the notes and plat. One of the earliest purchasers found the stakes, and relied thereon. Others accepted the stakes as marking the boundaries. An abutting street was improved with paving, gutters, curb, and parking in accordance with the boundaries of the lots established by the stakes. *Held*, that the stakes constituted monuments on the ground controlling the field notes, and established the boundaries between property owners and were controlling on the city.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3–41; Dec. Dig. § 3.*

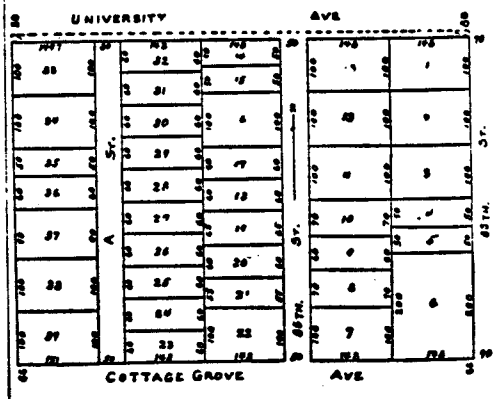
For other definitions, see Words and Phrases, vol. 5, p. 4576.]

Appeal from District Court, Polk County; J. A. Howe, Judge.

This is a controversy between adjoining lot owners over the location of their dividing line. The plaintiff brought this action to enjoin interference with his fence. There was a decree for the plaintiff establishing the line as claimed by him. The defendants appeal. Affirmed.

Ryan & Ryan, of Des Moines, for appellants. S. G. Van Auken and Bowen & Alberson, all of Des Moines, for appellee.

EVANS, J. Reference to the following plat will aid to an understanding of the case:



The foregoing is a plat of an addition to Des Moines known as "Kauffman place." The plaintiff is the owner of the north half of lot 22, and the defendants are the owners of the south half thereof. This lot faces east on Thirty-Sixth street. Thirty-Sixth street runs north and south. What appears as "A" street in the plat is referred to as

Thirty-Seventh street in this record. From the southeast corner of lot 22 to the northeast corner of lot 14 is a distance of 600 feet according to the plat, and according to the ground. This dimension also measures the distance between University avenue and Cottage Grove avenue as laid by the recorded plat. It is undisputed that lot 22, as platted, has a dimension of 100 feet fronting east on Thirty-Sixth street, and that the parties hereto are entitled each to 50 feet thereof. The controversy is over the true location upon the ground of the north and south lines of such lot. Practically all the lots shown on the plat as fronting east on Thirty-Sixth street and numbered from 14 to 22, inclusive, are improved and occupied as residence properties. In locating and taking possession of their lots, the respective owners were guided by the presence of certain stakes which were supposed to represent the respective corners as fixed upon the ground by the original survey. These stakes were all consistent with each other; and the respective owners successively took possession in accord therewith, and each owner is in possession of his appropriate dimensions indicated upon the plat. The improvement and occupancy of these lots began about 1905. At that time neither Cottage Grove avenue nor University avenue nor Thirty-Sixth street had been improved. The original survey of that ground was made in 1902 by one Dickenson. This survey, however, laid open only six lots on this ground, giving to each a frontage of 100 feet east on Thirty-Sixth street, and stakes were then set by the engineer 100 feet apart, to indicate the boundaries of each of such lots. Such plat was not recorded in such form. Just when the plat was made in the above form does not appear. This plat was filed and recorded in 1906, and after sales had been made therefrom. In April, 1907, the plaintiff purchased the north half of lot 22. He took possession in accordance with the stakes appearing upon the ground, and such possession was consistent with the claims of his neighbor on the north. The defendants also purchased in 1907 a few days prior to the purchase of the plaintiff. They also took possession of 50 feet south of plaintiff's assumed line. In the spring of 1909, after all the improvements above referred to had been made, except those of the defendants, a resurvey or measurement was had in pursuance of the call of the field notes of the original survey, and stakes were set in pursuance of this survey. The result of this survey was to disclose a discrepancy of approximately four feet between the call of the field notes and the stakes and lines which had been assumed and adopted by the respective owners. Under the call of the field notes every occupant was encroaching upon his neighbor to the south to the extent of approximately four feet, and was himself encroached upon in like manner by his neighbor on the north. In pursuance of this survey, the defendants claimed a four-foot strip of the ground occupied by the plaintiff. It will be seen, therefore, that the controversy involves a possible readjustment of all the partition lines in the block.

[1] The stakes which have been referred to were pointed out to plaintiff as the monuments fixing the boundaries of his proposed purchase, and he accepted them as such. If these stakes, or either of them, represented the monuments erected as a part of the original survey, then we have a case of conflict and discrepancy between the monuments upon the ground, on the one hand, and the field notes and plat as recorded, on the other. In such a case the law seems to be well settled that the survey upon the ground as ascertained by monuments then made to mark the boundaries of the lots is controlling, and the paper plat and field notes must give way thereto. Root v. Town of Cincinnati, 87 Iowa, 204, 54 N. W. 206; Bradstreet v. Dunn, 65 Iowa, 248, 21 N. W. 592; Ufford v. Wilkins, 33 Iowa, 110; McDaniels v. Mace, 47 Iowa, 510. To the same effect, see Olson v. City of Seattle, 30 Wash. 687, 71 Pac. 201; O'Farrel v. Harney, 51 Cal. 125; Holst v. Streitz, 16 Neb. 249, 20 N. W. 308; Flynn v. Glenny, 51 Mich. 580, 17 N. W. 65; Marsh v. Mitchell, 25 Wis. 706; Turnbull v. Schroeder, 29 Minn. 49, 11 N. W. 147; Burke v. McCowen, 115 Cal. 481, 47 Pac. 367; Morrow v. Whitney, 95 U. S. 551, 24 L. Ed. 456.

[2] The defendants do not controvert the legal propositions here involved. Their main contention is that the evidence fails to identify the stakes in question as being the monuments made upon the ground at the original survey. The case here is therefore made to turn upon this question of fact. The trial court held the evidence sufficient in that regard. From a careful reading of the evidence we also reach the conclusion that the identity was sufficiently proved. It is true that there is no specific identification by any witness who saw the stakes at the time of the original survey. But it is not legally necessary that the proof of identity should be in that form. It is undisputed that the engineer Dickenson made the original survey upon the ground by setting stakes 100 feet apart to indicate the boundaries of six 100-foot lots. In each case, the dividing line was to run due west from such indicated point, and parallel with the avenues. Dickenson also made the resurvey in 1909 from his original field notes, and thereby disclosed the discrepancy if discrepancy there was. He then saw the stakes upon which plaintiff and others relied. As a witness he would neither affirm nor deny whether such stakes were those that were set by him in 1902. If they were, they were not located where he intended to place them. In other words, they were not located in accordance with his field notes. In placing the stakes

originally he intended to place them in accord with the notes and paper plat. If, in fact, he placed them otherwise, it was a mistake on his part. Of necessity he could not know that he made this mistake; otherwise he would not have made it. The fact, therefore, that the plaintiff failed to show the identity of the stakes, or the occurrence of a mistake by the testimony of this witness, is not very significant. This remark is not intended to reflect upon the witness. On the contrary, his testimony impresses us as entirely candid. One of the earliest persons to buy and improve in this locality was the witness Townsend. This was in 1905, and before the improvement of Thirty-Sixth street or either avenue. He then intended to buy upon the west side of Thirty-Sixth street. He looked at every lot on that side of the street, and ascertained its supposed boundaries. At the supposed southeast corner of lot 22 he found a stake, and a succession of stakes 100 feet apart from there to University avenue. Due east from each one of these stakes on the east side of Thirty-Sixth street was a corresponding stake marking boundaries on that side. He later bought a lot on the east side of the street, and has occupied it ever since. He has been familiar ever since with the location of the stakes which he discovered in 1905. From 1905 down to the present time, the evidence of identity is abundant. The stakes and locations relied upon by plaintiff and others are the same as those ascertained by Townsend. They are located due west of similar stakes 100 feet apart on the east side of Thirty-Sixth street. The fact that other stakes are found also which indicate smaller subdivisions of the original lots does not affect the question. Their location was determined by mere measurement from the original 100-foot points. These stakes were universally accepted by all parties in interest as representing the original survey until the survey of 1909. The record discloses no apparent advantage to be gained by any one by a shifting of the location of these stakes. So far as appears, every owner is in possession of the appropriate dimensions indicated by the plat, and this includes the defendants who are in possession of a little more than 50 feet. Their contention at this point, however, is that their possession is an encroachment of 4 feet upon Cottage Grove avenue, and that they hold such possession by sufferance, and not by right. The evidence shows that the south stake ascertained by Townsend purporting to be the southeast corner of lot 22 was actually located at the southeast corner of defendant's present possession. It does appear that Cottage Grove avenue at this point is only approximately 62 feet wide, whereas it is supposed to be, according to the plat 66 feet wide. The defendants' sidewalk apparently encroaches upon the platted street, approximately four feet beyond the ordinance provision. But such sidewalk as actually laid is nevertheless in a straight line with its extensions east and west. It is a somewhat inexplicable peculiarity of the situation that the sidewalk between Thirty-Fifth and Thirty-Seventh streets encroaches upon the width of Cottage Grove avenue, and that such encroachment is the result of keeping such sidewalk in a straight line with its extensions east and west. In other words, east of Thirty-Fifth street and west of Thirty-Seventh street Cottage Grove avenue is 66 feet wide. The sidewalk is laid at such points one foot south of the lot line according to ordinance. Beginning, however, at any point in the sidewalk east of Thirty-Fifth street and extending the same west in a straight line, it encroaches upon the avenues as platted between Thirty-Fifth and Thirty-Seventh streets. The sidewalk as actually laid between Thirty-Sixth and Thirty-Seventh streets is laid in such straight line, and yet is five feet south of the lot line of 22 as claimed by defendants, or one foot south of such line as claimed by plaintiff. If the sidewalk were removed to its proper location as contended for by defendants, it would be four feet out of line with the sidewalk which is properly located east of Thirty-Fifth street and west of Thirty-Seventh. Such a change of location would give to Cottage Grove avenue its full width of 66 feet, but it would also throw its north boundary out of line for the two blocks mentioned. Cottage Grove avenue has been fully improved with paving, gutters, curb, and parking and these improvements have been adapted to the encroachment, if such it is. If the monuments upon the ground are controlling as to the property owners, there is nothing in this record to indicate that they are not likewise controlling upon the city. In this view, the mistake or discrepancy, if any, has operated equitably upon all. It does not appear that any property owner has been deprived of any dimension or suffered in location. The sum of the whole trouble seems to be that there is a loss of width to Cottage Grove avenue, and a gain to University avenue.

We think the monuments or stakes upon the ground are sufficiently proved to have been a part of the original survey, and that they must accordingly control.

We reach the conclusion upon the whole case, therefore, that the decree of the trial court was right, and it is accordingly affirmed.

CITY OF RACINE *v.* J. I. CASE PLOW CO.

Filed January 9, 1883.

The rules of evidence to be resorted to in ascertaining the true location of the streets, blocks, and lots of a city or town, according to the plat and survey thereof, are ranked in degree as follows: (1) The highest regard is had to natural boundaries; (2) the lines actually run, and corners actually marked on the ground, at the time of the making of the plat and survey; (3) the lines and corners of an adjoining lot or block, if called for or ascertained; (4) if no monuments are mentioned or in existence, evidence of long-continued occupation; (5) if the description is ambiguous or doubtful, parol evidence of the practical construction given by the parties by acts of occupation, *recognition of monuments*, or boundaries; and (6) the courses and distances marked on the plat or survey.

In this case, in ascertaining the true location of the street in question before resorting to the uncertain courses and distances on the plat and survey, recourse should have been had (1) to the natural monuments referred to in the plat and surety; and (2) to the artificial monuments placed by the surveyor to mark the lines or boundaries thereof. The plat or survey should be resorted to, to show the existence of the street or block as such, and the monuments to establish the lines and corners according to the same.

Appeal from circuit court, Racine county.

Winslow & Bronson and *Fish & Dodge*, for appellant, city of Racine. *F. C. Winkler* and *H. A. Cooper*, for respondent, J. I. Case Plow Company.

ORTON, J. The complaint is for an injunction to restrain the defendant company from encroaching upon Water street, in Harbour addition to the village (now city) of Racine, by constructing buildings upon block 15 projecting into said street, and for the removal and abatement of any such projections already constructed within such street, and for the establishment of said street according to the survey and plat of said addition, and as marked thereon. The answer denies the encroachment, and raises the only question in the case, and that is, what is the true location of Water street according to the plat and survey? By the courses and distances appearing on the plat and survey, there appeared to be no encroachment, and that the north side of the street was far south of the constructions complained of. The courses and distances, if relied on in determining the true lines and boundaries of the streets and lots in this addition, will very materially change all the north and south lines of all of the streets, blocks, and lots from those which had been generally and uniformly recognized and acquiesced in, and according to which they have been occupied and used, and to which the buildings and improvements on the lots, and contiguous to the streets, have been adjusted for over 30 years after the same was platted, and would cast all the lines into confusion, and create conflict and litigation in respect to the whole plat; and this would probably be the result, in at least a majority of cities and villages, by adhering to such a criterion in determining the location of their streets and lots. The original plats, maps, and surveys of western cities and villages, in respect to figures of measurement, and courses and distances marked thereon, in a large majority of cases have been found notably imperfect, incorrect, and unreliable.

The early settlers, who first buy and build upon the lots, do not attempt to ascertain their lines by a computation of measurements of all the other lots and blocks by the figures on the plat, or stated in the certificate of survey, or the courses and distances marked thereon, or by a resurvey from the starting point of the first one. But they consult the stakes, and other monuments and land-marks, either natural or artificial, fixed and placed at the time of the original survey, if any, and such is generally the case, and such is the method adopted by those who buy and build afterwards, if such land-marks still exist; and afterwards, and after such monuments or land-marks have been destroyed or removed, such lines are ascertained by constructions of a permanent character which were built according to such original monuments, and finally, as time goes on, long usage, prescription, antiquity, and reputation may be the

only means of determining the true lines and boundaries, and these meth[ods] in this order are to be preferred to courses and distances and figures mar[ked] on the original plat and survey, as the higher degrees of evidence. At almo[st] any time in the course of municipal history, to rely upon the figures, cour[ses] and distances of the original plat and survey, or upon a resurvey upon [the] *data* thereof, would be utterly subversive of the rights of real property, and [of] public and private interests. So far as the figures, courses, and distances [on] the plat and certificate of survey of this addition is concerned, it is candidly admitted by the learned counsel of the respondent that the 304 feet mentioned in such certificate as the north and south extension of the block directly south of and contiguous to the Water street in question is obviously a mistake, and does not agree by some 95 feet with the figures designating the width of the lots in said block, and it is argued that it is a mistake because they do not agree. This shows the utter unreliability of such figures, courses, and distances marked on the plat and survey, for who can say what figures shall be taken as correct when they do not agree. And yet the circuit court predicated its findings for the defendant in this case upon such evidence alone.

But, without further argument, the rules of evidence in such cases, [have] become so cardinal and elementary that the citation of many authorities in which they are recognized and repeated, is not necessary. "The principle on which these rules are founded is that effect should be given to those things about which men are least liable to make a mistake." *Davis* v. *Rainsford*, 17 Mass. 210; *McIvor* v. *Walker*, 9 Cranch, 178; 1 Greenl. Ev. § 301 and [note]. These rules are founded upon that principle, and are ranked in degree as follows: *First*, the highest regard is had to natural boundaries; *second*, to lines actually run and corners actually marked on the ground at the time of the making of the plat and survey; *third*, the lines and courses of an adjoining lot or block, if called for or ascertained; and, *fourth*, the courses and distances marked on the plat or survey. See above note. There is yet another criterion not mentioned in the note, which is to be preferred to courses and distances. If no monuments are mentioned or in existence, evidence of long-continued occupation, though beyond the given distance, is admissible. *Owen* v. *Bartholomew*, 9 Pick. 520. And yet another. If the description is ambiguous or doubtful, parol evidence of the practical construction given by the parties, acts of occupation, *recognition of monuments*, or boundaries is admissible. *Stone* v. *Clark*, 1 Metc. 378. These rules in respect to the comparative weight to be given to evidence in such cases, especially as between monuments, natural or artificial, designated or fixed at the time of the survey, and courses and distances marked on the plat or survey, have been frequently recognized by this court. *Vroman* v. *Dewey*, 23 Wis. 530; *Marsh* v. *Mitchell*, 25 Wis. [586]; *Fleischfresser* v. *Schmidt*, 41 Wis. 223; *Nye* v. *Biemeret*, 44 Wis. 104; *Lee* v. *Kennedy*, 49 Wis. 602; S. C. 5 Wis. Leg. N. 90; [S. C. 6 N. W. Rep. [...]

The testimony was overwhelming that at the time the plat and survey of this addition were made stakes were placed along both sides of Water [street] between this block 15 and block 14, south of it, to designate these lines, and that soon thereafter fences were built according to these stakes on both these lines, and remained there over 30 years. In building the fence on the south line of block 15, posts were set in the exact place of the stakes at each corner, and this fence was built within a few inches north of two trees which are still standing, and a natural sidewalk was left along the line towards the street and a ditch dug outside of that, and such ditch remained until the defendant purchased block 15 in 1877. It was further shown that on the south-east corner of block 17, west of block 15, and across a [street] there was also placed a stake at the line of the survey on the exact line of the stakes above mentioned, and that afterwards a shanty was built on that corner according to such stake, which still remains; and that there were other buildings constructed on the line of these stakes, which still [remain]

Nearly all of these material facts were proved by the testimony of witnesses who were personally cognizant of the original survey, and two of them respectively first owned blocks 14 and 15, and continued to own them until quite recently, and their testimony was abundantly corroborated by other witnesses.

According to the south line of block 15 and the north line of Water street, established by this evidence, the defendant company had encroached and threatened to encroach upon said street with its buildings about seven and one-half feet. All the testimony in relation to these stakes, fences, buildings, and other monuments along these lines was first admitted under objection, and afterwards ruled out by the court. It is claimed, however, by the learned counsel of the respondent, that all of this evidence was not ruled out, but only that relating to the fences, and not that relating to the stakes or other monuments set at the time of the survey. But we think it is clear that the court finally rejected all of it, or that which was admitted under objection. It would have been idle to admit that in relation to the stakes without also admitting evidence where the stakes were placed. But if the circuit court rejected any of it, as is admitted, it was clearly error, and it was equally erroneous to find where the line of Water street was in utter disregard of this evidence. It is claimed also, by the learned counsel of the respondent, that all of this evidence was outside of the case as made by the pleadings, and irrelevant, as the complaint avers the location of Water street and the encroachment thereon, according to the recorded plat. The plaintiff is therefore bound by the figures, courses, and distances appearing thereon, and the certificate of survey, and it may be that the court adopted the same view in rejecting and disregarding such evidence, and in predicating its findings upon what were deemed the courses and distances marked upon the plat and survey.

This position is, certainly, very critical, if not captious. By the rules of evidence above referred to the only proper way of ascertaining the true location of the streets, lots, and blocks, according to the plat and survey, is to consult—*First*, the natural monuments referred to therein; and, *secondly*, the artificial monuments placed by the surveyor to mark the lines or boundaries thereof, before resorting to the uncertain courses and distances on the plat and survey. In any case the lines are determined according to the plat and survey, and as much in one case as another. The recorded plat and survey must be resorted to in order to show the existence of the street or block as such. There is no exception taken or objection made to the plat and survey, and they are both, probably, correct, and the monuments are only resorted to in order to establish the lines and corners according to the same. The courses and distances marked thereon may be, and in this case they are, incorrect, and therefore will not and do not establish the lines and corners according to the plat and survey. The only difference in the two methods is that the monuments are the more certain one, and better evidence to ascertain the same fact rather than the courses and distances, and that fact is where Water street really is according to the plat and survey. In our opinion the plaintiff conclusively proved the encroachment complained of, and should have had judgment.

The judgment of the circuit court is reversed, and the cause remanded, with direction to render judgment according to the prayer of the complaint.

(280 Ill. 187)

WOLPERT v. CITY OF CHICAGO.

BALDWIN v. SAME.

(Nos. 11466, 11467.)

(Supreme Court of Illinois. Oct. 23, 1917.)

1. BOUNDARIES ⟸5 — MARKING BY MONUMENTS.

The true boundary lines of lots are where they are actually run on the ground and marked by the monuments placed by the surveyor to indicate where they are to be found.

2. MUNICIPAL CORPORATIONS ⟸43 — PLATS BY LANDOWNERS.

The owner of a tract of land has a right to manage and dispose of it as he sees proper, subject to the laws of the state, and he can subdivide it into lots, streets, and alleys, and locate them where he sees fit.

3. DEDICATION ⟸51 — EFFECT — WIDTH OF STREET—SURVEY FIXING BOUNDARIES.

Where the owner of a tract of land has it surveyed and subdivided into lots, streets, and alleys, the survey fixing the boundaries of the lots, streets, and alleys is the original work, the recorded plat being made from it, and intended to be a faithful representation of it, and the city

can only take title to a street as it is surveyed in trust for the public.

4. BOUNDARIES ⇐5 — MONUMENTS OF SURVEYOR—CITY SUBDIVISIONS.

The purchasers of lots in a subdivision and the city are bound by the monuments erected by the surveyor who laid out the plat and made the subdivision under the direction of the owner.

5. MUNICIPAL CORPORATIONS ⇐651 — LOCATION OF STREET — PLATTING OF LAND BY OWNERS.

If the line of a section, as run by the government surveyor, is not coincident with the line run by the surveyors employed by owners to lay out plats, the right of the owners is not lessened to locate the street and line of the survey, so far as they own the property, at the point where it is located in the surveyors' plats.

6. DEDICATION ⇐51—WIDTH OF STREETS.

The owners of property dedicated as part of a street only as much land as they owned west of the west line of the west tier of their lots as fixed and staked on the ground by surveyors employed by them to make plats.

7. MUNICIPAL CORPORATIONS ⇐657(2) — VACATION OF SUBDIVISIONS AS TO STREETS AND ALLEYS—ASSENT OF CITY—STATUTE.

Hurd's Rev. St. 1915-16, c. 109, § 6, permits subdivisions to be vacated by the owners as to streets and alleys without the assent of the city authorities, subject to the restrictions and qualifications mentioned in the statute.

8. JUDGMENT ⇐702—RES ADJUDICATA—PERSONS BOUND.

The failure of a city, defendant in suits concerning the proper location of a street, to attack the correctness of the decree in a former suit between it and a property owner other than plaintiffs, did not prevent plaintiffs from insisting on their rights in the present suit regardless of the finding in the former suit, and the court, in reaching the proper conclusion, cannot be influenced in any way by the finding in the former suit.

9. MUNICIPAL CORPORATIONS ⇐654 — LOCATION OF STREET—EVIDENCE.

In suits by two property owners against a city concerning the proper location of a street, the trial court properly refused to admit testimony, on behalf of the city, that after decree contradictory to plaintiffs' contention was entered in a former suit against the city by another property owner, the city, when laying curbstones near the other owner's property and paving the street at that point, conformed to the decision of the suit, the evidence being immaterial, as plaintiffs were not parties to the former suit and could not be bound thereby.

10. EVIDENCE ⇐163 — BEST EVIDENCE — PROOF OF FACTS OF RECORD.

The only proper way to prove facts which must have become part of the records of a city when it annexed towns is by the records themselves.

11. MUNICIPAL CORPORATIONS ⇐654—LOCATION OF STREETS—EVIDENCE—PRESCRIPTIVE USE.

In suits between property owners and a city concerning the proper location of a street, evidence as to the city's prescriptive use of the street was properly excluded where it did not show a prescriptive use of the disputed six feet.

12. MUNICIPAL CORPORATIONS ⇐650 — LAYING OUT SUBDIVISIONS — LOCATION OF STREET.

Though a particular stone should have been used as the starting point by surveyors in making subdivisions, in view of the fact that the owners and surveyors laid out and staked a street on the ground itself at a particular point in accordance with another stone, the proper line of the street at such point was as laid out.

Appeal from Superior Court, Cook County; Charles M. Foell, Judge.

Suits by Bessie Wolpert and Richard W. Baldwin against the City of Chicago. From decrees for complainants, defendant appeals. Affirmed.

Samuel A. Ettelson, Corp. Counsel, of Chicago (Morton S. Cressy and Emanuel Eller, both of Chicago, of counsel), for appellant. Charles L. Bartlett and Sherman C. Spitzer, both of Chicago, and Robert Humphrey, of Lincoln, for appellees.

CARTER, C. J. These two cases were consolidated in this court and heard on the same briefs. Apparently they were consolidated and heard together in the superior court. Each bill was filed to restrain the city of Chicago from interfering with appellees in the construction of certain buildings on lots adjoining Western avenue. After hearing, a decree was entered by said court in each case perpetually enjoining the city of Chicago, its officers, agents, and employés, from interfering with appellees in any way in the construction of said buildings. From each of these decrees this appeal was prayed.

A statement of the facts in each of the cases will be necessary in order to understand them. Appellees, Bessie Wolpert and Richard W. Baldwin, each owned two lots immediately east of and adjoining Western avenue, Baldwin's being situated about a block north of those owned by Bessie Wolpert. Barbara Portman, being the owner of the west 12 acres of the north 31.21 acres of the northwest quarter of the southwest quarter of section 7, caused the same to be surveyed, subdivided, and platted into lots, streets, and alleys. The plat was made, executed, certified, and acknowledged as required by the statute, and was recorded in the recorder's office of Cook county September 19, 1883. Thereafter Clara Becker, having become the owner of lot 3 in said Portman subdivision, caused said lot to be surveyed, subdivided, and platted into lots, streets, and alleys, and a plat executed, certified, and acknowledged as required by statute was recorded in said recorder's office June 16, 1890. On May 12, 1898, Elias Olson and Wilhelmine Eifler, having become owners of lots 6 and 7 in said Becker subdivision, together with all of the other owners of said west 12 acres, executed an instrument duly recorded May 18, 1898, vacating all plats, subdivisions, and resubdivisions of said west 12 acres. On the same day that this vacation instrument was recorded a plat duly executed by Elias Olson, Wilhelmine Eifler, and all of the other owners of said property was filed for record in said recorder's office, entitled "Portman's addition to Ravenswood," being a subdivision of said west 12 acres of the north 31.21 acres, again subdividing that part of the said 12

acres south of Foster street and north of Winamac avenue. Thereafter appellee Bessie Wolpert acquired title to lots 6 and 7, in block 3, in said Portman's addition to Ravenswood, free and clear of all incumbrances, liens, and easements. No question is made as to her having good title to said lots 6 and 7, the only question being as to where the west or front line of said lots is located. Said lot 7 is 25 feet in width, and said lot 6 is 26.9 feet in width, and each lot is 125 feet long, and fronts on the east line of Western avenue.

The evidence further tends to show that about May 1, 1916, appellee Bessie Wolpert caused plans and specifications to be submitted to the commissioner of buildings of the city of Chicago for the erection of a building upon said lots 6 and 7, and that said plans and specifications were approved by said commissioner and a written permit issued to her for the erection of such building. The bill represents that thereafter said appellee commenced the construction of said building in accordance with said plans, specifications and permit, entirely on said lots 6 and 7 as surveyed, staked, and platted; that about August 2, 1916, after said building had been erected to about 6 feet above the level of the sidewalk in front of it, said city of Chicago, by and through its employés, notified said appellee to cease work on said building for a distance of 6 feet east of the west line of said lots 6 and 7 as laid out, staked, and platted, and has since said last-mentioned date refused, and still refuses, to permit appellee to enter upon said 6 feet and continue the construction of the building.

The evidence also shows that in 1904 Oscar B. Conklin was the owner of all that part of the west half of the southwest quarter of the northwest quarter of said section 7 lying south of the center of the Bowmanville road, with certain exceptions, and caused the same to be surveyed, subdivided, and platted into lots, streets, and alleys, the plat being duly acknowledged and certified as required by statute and filed in said recorder's office November 21, 1904; that thereafter, on May 17, 1916, there was conveyed to Richard W. Baldwin and wife the title to lots 59 and 60 in said Conklin's subdivision; that about that time Baldwin caused plans and specifications to be submitted to the commissioner of buildings of said city of Chicago for the erection of a building on said two lots; that on June 20, 1916, said commissioner approved the plans and specifications and issued to Baldwin a permit for the construction of the said building; that Baldwin, on or about June 18, 1916, commenced excavating for the building under a temporary permit, and that on June 20, 1916, the city notified him to cease work on the excavation for a distance of 6 feet east of the west line of said lot 59, and has at all times since refused to permit him to enter upon and continue the excavation or construction of such building upon said 6 feet. Lots 59 and 60 are each 30 feet in width and about 125 feet in length. Lot 59 is the corner lot, facing south on Foster avenue, and bounded on the west by the east line of Western avenue. Lot 60 is located immediately east of lot 59.

The evidence shows that there were two stones, each claimed by various persons to mark the northwest corner of said section 7, one known as the Bradley stone and the other as the Rossiter stone, and that the surveyor, in surveying and staking said Portman's addition to Ravenswood, ran a straight line from said Bradley stone to the southwest corner of said section for the west line of the section, and then ran a line 33 feet east of and parallel with said first line for the east line of Western avenue and the west line of the lots fronting on Western avenue; that the surveyor, in laying out and surveying for the Conklin subdivision, also used the Bradley stone, and not the Rossiter stone, as a starting point. Appellant apparently contends, if the argument of its counsel be carried to a logical conclusion, that the government surveyor who originally surveyed said section 7 set the quarter section corner stake several feet east of a straight north and south line connecting the two corners of the section, thereby making the west line of said section 7 an angling line, angling from the northwest and southwest corners of the section to a point at the quarter corner (Foster avenue, as shown on the plats) 6.7 feet or less east of a straight line drawn from section corner to section corner, and that such angling line is the true west line of the section. Counsel for appellees contend that the section line corresponds with the surveys made at the time the said Portman's addition to Ravenswood and Conklin's subdivision were made.

Both counsel in their briefs refer to the government survey, but the record does not show clearly who made that survey. Apparently, from the pleadings, Bradley was a surveyor employed by one of the towns subsequent to the government survey. Rossiter was also a surveyor, who placed the stone called by his name after the placing of the Bradley stone. His son testified at this hearing. We think it is clear that the surveyor who laid out Portman's addition to Ravenswood, and the one who laid out Conklin's subdivision, adopted the stone that Bradley had placed in making his survey as their starting point and made their plats accordingly, and that the surveyor who laid out Portman's addition drove stakes or planted stones at many northwest and southwest corners of the lots fronting on Western avenue, and that these stakes and stones were driven or planted on a line parallel with and 33 feet east of a straight north and south line run from said Bradley stone as the northwest corner of the section to the southwest corner of the section. Somewhat similar testimony was given by the surveyor with refer-

ence to driving stakes and planting stones at the corners in the Conklin survey, and the evidence tends to show that some of these original stakes and monuments are still in the ground where they were placed by the surveyors and were later found by other surveyors at the points indicated. Some of these surveyors testified that they found both the Bradley and the Rossiter stones, and that in attempting to run the lines, taking the Rossiter stone as a starting point, they did not find that they fitted in at all accurately with the buildings and fences already constructed; that in taking the Bradley stone as a starting point they found that the surveys fitted the occupancy better, and therefore they used the Bradley stone as a starting point rather than the Rossiter stone.

Counsel for appellant insist that the original Portman survey and plat should control as to the true boundary line on Western avenue. It is clear, however, from the answers filed by the city in these cases that it admitted that said plat, and the later one made by Clara Becker, were vacated and set aside as to both these subdivisions, and, of course, without amending these answers the city is in no position to raise the question that the plats as to these subdivisions were not properly vacated. Counsel for appellant claim, however, that the trial court erred in refusing to permit it to amend its answers. We shall refer to this point later.

[1-6] There can be no question that the true boundary lines of lots are where they are actually run on the ground and marked by the monuments placed by the surveyor to indicate where they are to be found. Counsel for appellant concede this to be the law as laid down by this court in Read v. Bartlett, 255 Ill. 76, 99 N. E. 345, but seem to insist that there is nothing in the deeds conveying either of these lots, or in the plats, to indicate that they referred to the monuments placed in the ground. The plats introduced in the record as to Portman's addition to Ravenswood show at many points at the corners of lots that stones had been planted at those points. We think the testimony of the surveyors tends to show that some of these stones or stakes were found by them at the points indicated on the plats. The owner of a tract of land has a right to manage and dispose of it as he sees proper, subject to the laws of the state, and he can subdivide it into lots, streets, and alleys and locate them where he sees fit. The survey fixing the boundaries of the lots, streets, and alleys is the original work, as the plat is made from it and intended to be a faithful representation of it. The city can only take the title to the street, as it is surveyed, in trust for the public. The purchasers of the lots in a subdivision, and the city, are bound by the monuments erected by the surveyor who laid out the plat and made the subdivision under the direction of the owner. Lull v. City of Chicago, 68 Ill. 518; City of Decatur v. Niedermeyer, 168 Ill. 68, 48 N. E. 72. In the present case the west line of section 7, as shown on the plats of the two subdivisions, must be taken to be the west line of the section as run by these surveyors, and, under the authorities just cited, if said west line as run by the government surveyor is not coincident with the line run by these surveyors that would not in any way lessen the right of the owners to locate the street and the west line of the survey, so far as they owned the property, at the point where it was located in such plats. The surveyors located the west line of the west tier of lots in these two subdivisions and set stakes at the corners of these lots. The owners of the property dedicated as a part of the street called Western avenue only as much land as the dedicators owned west of the west line of said west tier of lots as fixed and staked on the ground by the surveyors. It therefore necessarily follows that the west line of appellees' lots is the west line as the same was staked by the surveyors who made the respective subdivisions, and we cannot escape the conclusion from the record that this west line was the line claimed by appellees as the west line of their respective properties, and that this was properly so found by the decrees.

[7] It seems to be urged by appellant, indirectly at least, that the subdivisions could not be vacated by the owners as to the streets and alleys without the assent of the city authorities. The statute on this question as construed by this court does not so require. Hurd's Stat. 1916, c. 109, § 6, p. 1985; Littler v. City of Lincoln, 106 Ill. 353; Heppes Co. v. City of Chicago, 260 Ill. 506, 103 N. E. 455. These decisions hold that under this statute the joint action of the city council of cities or board of trustees of villages is not required to concur with the owner of the premises in so vacating a plat, including the streets and alleys, but that the owners of their own volition, subject to the restrictions and qualifications mentioned in the statute, may vacate the plat or part of plat by their instrument declaring that fact. This vacation seems to have been carried out in accordance with the provisions of the statute, and that fact is conceded in the original answers of appellant.

In May, 1905, the city of Chicago passed an ordinance for cement sidewalks 6 feet in width on both sides of Western avenue north and south of and adjacent to each of these properties. These sidewalks were thereafter laid by special assessments, assessed and levied in the county court of Cook county. Counsel for appellees claim that the ordinance required that these sidewalks were to be laid parallel to and one foot from the lot lines as platted in the two subdivisions here in question, and that the sidewalks were so laid adjoining these properties on the east side of Western avenue. Counsel for appellant claim

that there is no proof in the record that these sidewalks were laid within a foot of the lot lines. It is insisted by counsel for appellees that the assessment ordinance proved that fact, but while the ordinance was apparently introduced it is not a part of the record. There are, however, blueprints of plats shown in the record that indicate that the cement sidewalk along these properties was constructed only a short distance from the lot line, and, judged by the marks upon these blueprints, at approximately one foot from said lot line. These blueprints also tend to show that for several blocks south and north of these properties buildings have been constructed and curbstones put in which apparently conform to the line contended for by appellees on this hearing.

It appears that several years before the institution of these proceedings there was a suit between the city and one Budlong, the owner of property apparently located approximately across Western avenue from appellee Baldwin's property. Appellant offered to introduce the files, including the decree, in the Budlong suit on the hearing, but the court sustained an objection and refused to allow these files in evidence. Apparently, from the briefs, the superior court in that case decided that Budlong's line was some 6 feet east of where it would be if appellees' contention in this suit be correct as to the proper location of the west line of said section 7. The decree in that case was never appealed from, and therefore may be binding upon the parties to that litigation. Neither of the appellees was a party to the Budlong suit or in any way connected with it. That suit, in the briefs here, is called the McEwen suit, apparently because it was heard by Judge McEwen in the superior court. Counsel for appellant say in their briefs in this case:

"It matters not as to whether the evidence and testimony in the McEwen suit is admissible in the suits before this court on this appeal. The question that the two decisions are absolutely in conflict with each other is a fact which this court must recognize."

[8] We think this argument is entirely without merit. The record of the McEwen suit is not before us, and we could not, if we would, pass on the merits of that litigation. The city was authorized to have that case reviewed by the higher court, but failed to do so. Its failure to so attack the correctness of that decree does not in any way prevent appellees from insisting on their rights in this suit regardless of the finding in the McEwen suit, and the court, in reaching the proper conclusion in this case, can in no way be influenced by the finding in the McEwen suit. It appears from the blueprints in the record that the city, after that suit, recognized, on the block in which the Budlong property is located, the finding in the McEwen suit as the proper east boundary line of the lots and constructed the sidewalks on that block accordingly, but the cement sidewalks south of the Budlong property, for several blocks, as appears from these blueprints, as well as the buildings constructed in the blocks some distance south of the Budlong property, were built in accordance with the surveys contended for by appellees in this litigation.

[9] In this connection it is proper to note that counsel for appellant insist that the trial court erred in not permitting the city to show that after the decree was entered in the McEwen suit, the city, when laying the curbstones near the Budlong property and paving the street at that point, did conform to the decision in the McEwen suit. The trial court properly refused to admit this testimony, as it could have no bearing on the real issues in this case. The appellees in this suit, as already stated, were in no way made parties to the McEwen litigation, and could not be bound thereby.

Counsel for appellees insist that the city of Chicago is estopped by the special assessment proceedings as to the sidewalks from claiming that the location of appellees' front or street line is other or different from that claimed by appellees. The reasoning of this court in City of Joliet v. Werner, 166 Ill. 34, 46 N. E. 780, and Highway Com'rs v. Kinahan, 240 Ill. 593, 88 N. E. 1044, and cases there cited, tends to support appellees' contention in this regard. It is, however, unnecessary for us to discuss the question of estoppel further, as it is clear, on this record, that the appellees' position as to the lot line must be sustained on the basis that their lots were properly subdivided, with their western boundary line as contended for by them, as was found by the decrees in this litigation.

[10] On April 10, 1917, after all the evidence had been heard in this case before the court, appellant filed a motion for leave to amend its answer in the Wolpert Case. A motion seems to have been made to amend the answer in the Baldwin Case somewhat earlier. Counsel for appellant insist that the trial court erred in not permitting them to amend their answers in accordance with these motions. The affidavits in both of these cases in support of these motions set forth mere conclusions of fact, substantially to the effect that the affiant, who was one of appellant's solicitors, on April 5, 1917, in a conversation with one of the witnesses for the defendants, "first ascertained the fact that the street known as Western avenue had been laid out by the town of Lake View and the town of Jefferson as a public highway on or about the year 1867, and had been used continuously and uninterruptedly from that time until the present time as a public highway and public street." The affidavits do not state whether said street was so laid out in front of the properties in question or at some other place, or that it was laid out by joint action and resolution of the town boards of the town

of Lake View and the town of Jefferson, as then required by statute, or that the records of said towns show that Western avenue in front of the properties in question had been laid out, but simply state that some one had informed the affiant that said road had been laid out. The affidavits do not state the width of the road claimed to have been laid out, nor do they show any diligence on the part of appellant or its solicitors in ascertaining the supposed facts relied upon as a defense in these affidavits. If the street in question had been laid out by said town boards, then the proceedings of said boards with reference thereto must have been recorded in their minutes and records and by the action of the authorities in annexing said towns to the city of Chicago would have become a part of the records of said city. All of these facts could have been readily ascertained from the records, and the only proper way of proving these facts would be by the records themselves. People v. Board of Supervisors, 125 Ill. 334, 17 N. E. 802. No facts were set out in the proposed amended answers, or in the affidavits in their support, that show, or in any way tend to show, that the several provisions of the statute were complied with, or even attempted to be complied with, as to the laying out of such road.

[11] Appellant also contends that the trial court erred in refusing to permit it to introduce evidence to show that Western avenue at this point has been traveled for years, and that the city has a right to the disputed ground in question by prescriptive use. In the evidence offered by appellant on this point there was no attempt made to prove that the west 6 feet of the land here in dispute was ever actually traveled or used by the public as a part of a prescriptive roadway, and there was no evidence offered which in any way tended to show that the 6 feet in question was ever used or traveled by the public as a highway. Without question, under the reasoning of this court in City of Chicago v. Galt, 224 Ill. 421, 79 N. E. 701, and Township of Madison v. Gallagher, 159 Ill. 105, 42 N. E. 316, and cases there cited, the evidence on this question offered by appellant was rightly excluded by the court as being insufficient to even attempt to show a prescriptive use of the road over the disputed 6 feet.

[12] We have tried to give the facts in this record the consideration that the importance of these questions to the public and to the property owners requires, and we can reach no other conclusion than that stated. In the most favorable light to appellant, the only possible claim that can be made here is that the surveyors who made the subdivisions platting the lots here in question did not see fit to take the Rossiter stone as their starting point, but took the Bradley stone instead. There is nothing in this record that would justify the court in finding that the Rossiter stone was the correct starting point instead of the Bradley stone. Even if the record plainly showed that the Rossiter stone should have been used, we think, in view of the fact that the owners and surveyors in laying out the Portman addition and the Conklin subdivision laid out and staked Western avenue on the ground itself at this point in accordance with the Bradley stone, that the decrees of the superior court must be held proper. We think the great weight of the testimony tends to show that the west line of the lots in question, as found by the decrees, conforms much more nearly to the buildings constructed upon the various lots in that vicinity, and the streets and alleys as laid out and occupied, than it would by taking the Rossiter stone as the starting point.

We find no error in the record. The decrees of the superior court will therefore be affirmed.

Decrees affirmed.

216 P.2d 707

WACKER et ux. v. PRICE et al.
No. 5114.

Supreme Court of Arizona.
April 3, 1950.

Action by Arthur Wacker and another against George F. Price and others to quiet title to a lot owned by plaintiffs on the theory that their lot was being encroached upon by defendants. The Superior Court for Maricopa County, Thomas J. Croaff, J., rendered a judgment for defendants, and plaintiffs appealed. The Supreme Court, Stanford, J., held that plaintiffs' lot was being encroached upon.

Judgment reversed, and cause remanded with directions.

Udall and de Concini, JJ., dissented.

1. Evidence ⇐157(2)

In a boundary dispute, Courts must resort to and be bound by best evidence available.

2. Boundaries ⇐8

Where two adjoining lots were conveyed by a single grantor with reference to north boundary line of another lot located to the south of both of those conveyed, and that boundary line had had a fence and hedge thereon for at least 30 years and conformed with other boundary lines between other lots in the block, and it was agreed that lots in the block were 50 feet in width, boundary between the two lots conveyed was to be determined with respect to evidence regarding established lot lines in the neighborhood rather than from a new survey.

3. Improvements ⇐4(3)

Where portion of house was constructed upon adjacent lot as result of inaccuracy of original survey, encroaching owner was entitled to have a determination made as to the amount of lot required for reasonable enjoyment of improvements constructed thereon, and adjacent owner was entitled to damages as a result of wrongful taking based upon a fair market value at date of taking.

4. Boundaries ⇐37(3)

In quiet title action, evidence established plaintiffs' claim that defendants' building encroached on land owned by plaintiffs.

H. B. Walker and Marshall W. Haislip, of Phoenix, attorneys for appellants.

Hill, Robert, Hill & Price, of Phoenix, attorneys for appellees.

STANFORD, Justice.

Action was filed in the superior court by appellants to quiet title in them to Lot 8, Block 31, Grand Avenue Addition to the City of Phoenix, Arizona, on the theory that their lot was being encroached upon by the appellees (defendants) who owned lot 6 but believed that their property, after a survey was made, did not encroach upon lot 8.

The case was tried before the court without a jury, and judgment was rendered in favor of appellees, from which judgment the appellants have appealed to this court.

On May 16, 1944, one Ida Shaw, a widow, gave a warranty deed to these appellants to said lot 8. On February 1, 1945, appellees also received from said Ida Shaw a warranty deed for lot 6, block 31 of said Grand Avenue Addition. The corners of neither of said lots were established by the Grand Avenue Addition map and the dimensions were not established except that most of the lots south of a main street to the north were accepted by owners to be 50 feet in width and it is stipulated that said lots are 50 feet in width. In November, 1946, the appellees secured a building permit to build on said lot 6 and erected a six room modern brick residence thereon.

When the two lots were purchased by the respective grantees no buildings were upon them nor were there any fences or other signs showing the location of the lots, except to the south of lot 8 was lot 10 owned by Della C. Newcomb. She had a home upon the lot which was built approximately 20 inches south of the south line of lot 8 and her north line was designated by a fence. Della C. Newcomb bought the premises in 1915 and has lived there since. There was also constructed on lot 10 a garage at the southwest corner of the lot. There was also a fence along the south line of the Newcomb lot, and at the time of the trial it had been there for 20 years and she claimed that the size of her lot was 50 x 137½ feet. She also claimed that she had her lot surveyed by Holmquist and Robinson in the year 1919.

According to the map of Grand Avenue Addition, which was filed before the addition was taken into the City of Phoenix, (filed of record in 1887) the lots in block 31 alternate, that is to say, the even numbers are on the east side and the uneven numbers on the west side of the block.

Venus McGinnis testified that he owned lot 12 in block 31 and stated that there was a fence on the north side of his lot and on the south side there was a hedge of trees, and when asked how old the trees were he answered: "Ever since—I don't know, they have been there forever almost." He had two buildings upon his lot.

Chester Adams testified that he lived in the Grand Avenue Addition and that his lot was number 14; that he had lived there for 15 years, but that he did not build the house, it being there before he obtained it.

One of the maps submitted in evidence which shows the fences, hedges and houses upon the lots in blocks 30 and 31, shows a house on lot 16, block 31, but no testimony was offered concerning it.

As to lot 18, block 31, lying to the south of lot 16, the testimony shows it was owned by Louis Radonick and had been owned by him for 20 years; that he had a house upon it and a fence along the north and south sides, the fence having been there for 20 years. He had owned but sold lots 16 and 20, each of which, from the map referred to, have houses upon them.

The next lot owner to the south is Joseph Shaughenessy, who testified that he lived on lot 2, block 30, being south of block 31, for 35 years and had a lot of trees and a fence on the north side of his lot; that the fence had been there for 20 years and the trees five or six years; that he owned lots 22 and 24 in block 31, being to the north of his lot 2, but there is a street (Cedar Street) between lot 2, block 30 and lot 24, block 31. He testified that there was an iron stake in the north corner and there was a line of Tamarisk trees on the north boundary of lot 22. He also testified relative to these two lots: "We have a steel

stake in the ground at the corner of each lot on the north side and south side."

Appellants contend that appellees claimed an interest in lot 8 which lot appellants claim to own, and the interest was adverse to appellants and the testimony showed that the house constructed upon that portion of lot 8 owned by appellants was an encroachment of 17.20 feet on the east end, or front, of the house, and 16.83 feet on the west end, or rear of the house.

F. M. Holmquist, called as a witness for appellants, testified that he was a civil engineer and had been such since 1909; that he had made surveys of the lots in blocks 30 and 31 of Grand Avenue Addition, and at the request of the appellant had made a survey in January, 1947, of blocks 30 and 31 of Grand Avenue Addition, and the witness testified that he made reference to the original Grand Avenue map recorded in Book 1, page 9 of the records of the County Recorder of Maricopa County, Arizona. Referring to that particular map this question was asked the witness

"Q. Is this map which counsel for the plaintiff has offered in evidence here, marked Plaintiffs' Exhibit 'C' for identification, does that show that lot lines as they are upon the official recorded map of this property? A. As near as you could tell, yes, sir. There may be some slight differences which just couldn't possibly be reconciled. In general they follow very closely.

"Q. You say it follows very closely? A. In general. As regards block 30, I don't know of any real differences—I mean block 31.

"Q. Block 31 you don't know of any real differences between this and the recorded map? A. That is right."

Harry E. Jones, civil engineer, was called as a witness for appellee and in testifying concerning lot 6 claimed by appellees, he said:

"Q. Now when you made this survey for lot 6 for Mr. Price, I suppose you did examine the ground down to the south part of Block 31? A. Oh, I have been aware of that situation out there for several years.

"Q. *When you prepared this map did you run into any stakes or markers at the corner of these other lots there in the south part of Block 31?* A. *No, sir, I didn't look for them.* I knew where I would find them, I knew they were there. I know Mr. Holmquist has been making surveys out there from those erroneously placed stakes for years.

"Q. And you told Mr. Price there were markers down there? A. We didn't discuss that; he didn't ask me and I didn't tell him. His lot was all in the clear, no encroachments on his lot, no adverse possession, no fences or anything.

"Q. Now on these other lots in that area, did you see these fences and these rows of trees, high trees 20 or 30 feet high? A. I have known of that area they own

here as I say for 42 years. I have been out there many times. I am thoroughly conversant with it.

"Q. And you have seen those trees for many years? A. Yes.

"Q. In your survey you totally ignored all those? A. *I wasn't requested to make a survey of property rights, just Lot 6, Block 31, which I did. Since there were no adverse claims or nothing that would indicate an adverse possession of that particular lot. We weren't interested any further.*" (Emp. Sup.)

F. M. Holmquist, witness for appellants, under cross examination stated:

"Q. Now getting back to this official map, it has no measurements on it at all. A. No, sir.

"Q. Just state the scale, 300 feet to the inch? A. That is what it says on the map, yes, sir.

"Q. What is the distance shown on the official map from the south line of McDowell to the north line of—of what used to be Elm Street? A. No distance given.

"Q. Can you give us that distance by looking at the map? A. No, sir, not from this map. I don't have any other records here that would give that.

"Q. Those streets in there, what are those streets? A. Well, they are generally 60 feet. The map doesn't say that, but by collateral evidence they have been determined to be 60 feet.

"Q. And you have generally accepted them as being 60 feet? A. Yes, sir.

"Q. Now granting all these lots in Blocks 33 and 32 and 31 as shown on the official map are 50 foot lots and the streets are 60 feet in width, what is the distance from the northeast corner of that subdivision, 33 feet south of the north line of that quarter section, or the north line of that section, to the north line of Elm Street as shown on the map? A. From the section line or the south line of McDowell.

"Q. The south line of McDowell? A. Each block would be 600 feet, and two blocks would be 1200 feet, plus Madrona Street, would make about 1260 feet to the north line of Elm Street, based on 50 foot lots.

"Q. Then there would be 33 feet north of that line to the center of McDowell? A. Yes, sir.

"Q. Which is the north line of Section 6? A. Yes, sir, based on the assumption.

"Q. Are there any City monuments located along Fifteenth Avenue between McDowell and Roosevelt? A. Yes, sir.

"Q. Did you make any use of any of those monuments? A. I tied into them.

"Q. I didn't understand. A. We tied into them.

"Q. Did you make any use of any of the distances on the City map between those monuments? A. No, sir.

"Q. In determining where this line is? A. Not as a basis of the survey, no, sir."

It is the theory of the appellants that surveys having been made for a long period of time by competent surveyors that the unde-

termined distances in the Grand Avenue Addition have for many years been settled and that the lots in block 31 have been determined to have a width of 50 feet. When the house in question was built, it was built within a few feet of lot 10, block 31 owned by Mrs. Newcomb for over thirty years, and her north line, being the south line of lot 8, was well defined by a fence.

Carrying out the theory of appellants we quote from the case of Silsby & Co. v. Kinsley, 89 Vt. 263, 95 A. 634, 638: "The actual location upon the ground of original lot lines will control, if capable of being ascertained; but, when such lines have never been surveyed or, if surveyed, their location upon the ground cannot be ascertained, resort may be had to the lines of adjacent lots to determine their location."

When the appellees had their survey made they could see plainly that something was wrong because there was not enough distance between the south line of appellees' house now upon the premises, and the north line of Mrs. Newcomb's place lying to the south, for a 50 foot lot. Therefore it was easily observed that there was an error somewhere. The Newcomb place had open to view a hedge and fence upon it.

In this respect we quote from the quiet title case of Atwell v. Olson, 30 Wash.2d 179, 190 P.2d 783, 786: "* * * The Olsons had ample opportunity to observe all improvements lying south of the hedge. They may not now be heard to say that they failed to see that which was plainly visible and which could have been ascertained upon inquiry. * * *"

The testimony in this case clearly shows that the lots involved in this litigation were conveyed with respect to and in accordance with the map and plat of the original Grand Avenue subdivision recorded in the office of the County Recorder September 13, 1888. It further appears from the evidence that the monuments from which the original survey was made cannot be accurately located. The evidence does show definitely, however, that parties who purchased lots in this subdivision erected homes, established boundary lines between lots in block 31 where the property involved here is located by building fences and planting trees which have been in existence and recognized by all the property owners and their predecessors in interest ranging from 20 years to 35 years. The exact date when these various fences and trees marking the boundary lines between lots in this block is more or less indefinite, none of which, however, appear to have been less than 20 years.

Based upon the rule of reason it would appear to us that where a situation like this obtains the boundary lines between the various lots in the subdivision as established by the parties themselves must control in determining the boundary thereof. Every lot in block 31 south of lots 6 and 8 here involved have definite boundaries established by acquiescence of the parties for a

much longer period than is required to establish title by adverse possession.

In 110 American State Reports, page 681, under the title of "Resurveys and their Purpose and Effect", the following is found: "* * * In Diehl v. Zanger, 39 Mich. 601, where the first survey of lots involved in litigation was made by one Campau, and a resurvey made years afterward by the city surveyor showed that the practical location of the whole plat was wrong, it was declared that a resurvey, made after the disappearance of the monuments of the original survey, *is for the purpose of determining where they were, and not where they should have been,* and that a long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared. 'Nothing is better understood,' said Justice Cooley in delivering the opinion of the court, 'than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. But no law can sanction this course. The (city) surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. * * * The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks set by Mr. Campau, and when those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known: Stewart v. Carleton, 31 Mich. 270. As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are.' * * *"

In 22 American State Reports, Ancient Boundaries, page 35, we find the following: "* * * For the purpose of establishing ancient boundaries, by locating calls for corners, etc., the declarations of the parties in interest, or those who assisted in making the old survey, are admissible, when such persons are unable to testify orally or by deposition, by reason of sickness or death: Whitman v. Haywood, 77 Tex. 557, 14 S.W. 166; Griffith v. Sauls, 77 Tex. 630, 14 S.W. 230. Ancient fences, used by a surveyor in his attempt to reproduce an old survey, are strong evidence of the location of the original lines, and if they have been

standing for many years, should be taken as indicating such lines, even against the evidence of a survey ignoring such fences, based upon an assumed starting-point: Beaubien v. Kellogg, 69 Mich. 333, 37 N.W. 691, for it will not do to allow boundaries to be disturbed upon a survey made from an assumed starting-point, without proof of its being a true line, located and fixed by the original survey. * * *"

In the case of Veve y Diaz v. Sanchez, 226 U.S. 234, 33 S.Ct. 36, 57 L.Ed. 201, in a plat of Bello Sitio made in 1907 showing that it contained 415 cuerdas and a mortgage was given upon 400 cuerdas in the subdivision and action was brought upon it and the defendant claimed that 134 of the lots or cuerdas supposed to be within the subdivision were in fact not in it and that only 279 were left and that the shortage was due to encroachments by adjoining land owners, it seems that in making the survey of the subdivision the surveyor made it by following ditches, fences, trees, stakes and the documents of adjoining land owners, all of whom were present when the surveys were made and assented to its correctness. The land owners were also examined as witnesses. Some of them had owned the property from the date of the mortgage and others for a shorter time, but all testified that they knew of no change in the lines. The boundaries as fixed by the survey were upheld by the Supreme Court of the United States.

Applying these principles to the instant case the grantor, Mrs. Shaw, conveyed lot 8 to the plaintiff Wacker and lot 6 to the defendant Price, true the boundary between the grantees was not by express grant designated by Mrs. Shaw, the grantor, but she did convey lots 6 and 8 with reference to the north boundary line of lot 10 owned by Mrs. Newcomb since 1913, which north boundary line had been established for at least 30 years and conformed with all of the other boundary lines between the other lots in the block south of her as fixed and acquiesced in by the property owners thereof. Therefore Mrs. Shaw in conveying lots 6 and 8 of the Grand Avenue subdivision to the City of Phoenix conveyed said lots with reference to said boundary line as fixed by the property owners in said block. And since it has been stipulated that the lots in block 31 are 50 feet in width the grantees took said conveyances with such monuments as have been established by the property owners and their predecessors in interest in block 31 by implied agreement and acquiescence over a period of years.

[1, 2] As was said in the Oregon case, Trotter v. Stayton, 41 Or. 117, 68 P. 3; Diehl v. Zanger, 39 Mich. 601, that it is a matter of common knowledge that the great majority of original surveys are more or less inaccurate and since it has always been the rule that courts must resort and be bound by the best evidence available, it follows that the boundaries fixed by the

property owners themselves in the absence of the inability of surveyors to definitely fix the monuments from which the original survey was made must control and that the city surveyor nor any other surveyor has any authority to establish new boundaries which must of necessity affect the property rights of all property owners concerned where they cannot establish title by adverse possession.

[3, 4] The recent survey of this property for the purpose of trial made by F. M. Holmquist, civil engineer, shows a part of the house constructed by appellees to be located upon the property of appellants. Under all of the circumstances it is plain to this court that it should apply its equity powers in order to be fair to all of these litigants. We hold that lot 8 according to the survey of Grand Avenue Addition, being a lot 50 feet in width lying next north of the fence, or the hedge of Mrs. Newcomb, the owner of lot 10, is the property of appellants. The court therefore reverses the judgment and remands the case to the trial court with instructions to take testimony as to what portion of lot 8 appellees will require for a reasonable enjoyment of the improvements constructed thereon and to fix the damages suffered by appellants as a result of the wrongful taking of said property based upon a fair market value of lot 8 at the date of taking and the portion thereof required by appellees for the proper enjoyment of their improvements thereon and what damage, if any, has been done to the remaining portion of said lot 8, and require appellees to pay appellants the determined value for the space to be taken and damage, if any, as above mentioned. If appellants do not choose to accept same, then permit the appellees to pay appellants the determined value of the whole of lot 8 as fixed by the trial court and take title thereto, but should the appellees decline to pay to appellant the amount fixed, then the court shall enter judgment quieting title to lot 8, described as a lot 50 feet in width adjacent to lot 10, block 31, Grand Avenue Addition and immediately north of the north side line of said lot 10, in appellants in accordance with the prayer of their complaint. Appellants to recover their costs in the trial court and on this appeal.

LaPRADE, J., concurs.

PHELPS, Justice (specially concurring).

I concur in the result of the opinion of Justice Stanford in this matter but desire to more fully state my reasons therefor.

So far as the evidence in this case discloses there was never made an actual survey of Grand Avenue Addition, and certainly none that a survey was ever made with reference to a governmental monument at McDowell Road and 15th Avenue. The map or plat thereof as filed in the office of the county recorder on May 28, 1887 is shown to have been prepared by a draughtsman. Later, on September 18, 1888, another map or plat of said subdivision was recorded. Both maps or plats are

referred to in the evidence as official plats although plaintiff admits that the latter plat is the official plat. The legend indicates that the plats are drawn to a scale of 300 feet to the inch. The width of lots and streets are not designated in the plat. It seems to be agreed by all the parties to this litigation, however, that the lots were intended as 50-foot lots and the streets 60 feet in width.

The court will take judicial notice of the fact that at the time the Grand Avenue Subdivision was platted the limits of the city of Phoenix extended west only to what is now Seventh Avenue between Jackson and Van Buren Streets known as the original townsite of the city of Phoenix, and all of the territory now embraced in Grand Avenue Subdivision north and east of Grand Avenue was desert, covered in large measure by mesquite. This condition obtained, according to the testimony of the witness Shaughnessey in this case, until as late as 1911 and 15th Avenue had not been opened at that time.

Apparently when lots were begun to be sold and homes constructed thereon it was necessary to have a survey made upon the ground to establish the location of the lot or lots purchased. The evidence shows that as early as 1919 Fritz Holmquist, one of the witnesses in this case and a competent civil engineer was called upon frequently to make these surveys and actually made said surveys and placed wooden or iron stakes at the corners of most of the lots on the east side of Block 31 of said subdivision. He was not questioned about whether he participated in surveys on the west side of said block but did say that he had made surveys in a number of blocks in that subdivision over a period of many years.

In any event homes were constructed, fences built and trees planted along the side lines of all of said lots to the south of Lots 8 and 6, Block 31, in accordance with said surveys. Only Lots 8, 6, 4 and 2 on the east side of Block 31 were vacant at the time the parties hereto purchased Lots 8 and 6 from a Mrs. Shaw. In Block 31 both on the east and west sides of said Block, property lines between all the lots except Lots 8, 6, 4 and 2 are marked by fences or trees which have been in existence over a long period of years. It is 207.5 feet from the north line of Lot 10 to the south line of the present alley located where Elm Street was shown on the original plat. This footage was sufficient to give to the purchasers of each of the four lots all the frontage they purchased and all the frontage they were entitled to under the law. Be it remembered that at the time Elm Street was abandoned the law did not give to the adjacent property owners the abandoned area as it now does. If appellee should prevail in this litigation the effect would be to reduce the width of appellant's lot approximately 30 feet, and to increase the frontage to the lot adjacent to the alley the same number of feet.

Elm Street above mentioned was immediately north of Lot 2 according to the map or plat of Grand Avenue Subdivision. In 1930 the board of supervisors of Maricopa County by resolution purported to abandon said street except the north 20 feet thereof which it reserved for an alley. An examination of the original map or plat of Grand Avenue Subdivision shows that Ash Street, now Roosevelt Street, marked the south boundary of said subdivision; that it crosses Grand Avenue and continues straight east without the slightest offset in the side lines thereof, and presumably exists today as it was designated at that time. At least there is no evidence to the contrary. The plat further shows that Cedar Street which lies one block north and immediately south of Block 31, if projected, the side lines thereof would be superimposed upon the side lines of Magnolia Street to the west of Grand Avenue.

The side lines of all lots south of Lots 8 and 6, Block 31, on the east side thereof have been established by common consent and title vested thereto in the respective owners by adverse possession, and the evidence concerning side lines of lots on the west side of said Block seem to indicate a like condition. A comparison of these property lines with the original plat, the city map, and Plat E of the F. Q. Story Addition will reveal these property lines are in practical conformity with the original plat.

While it is true that public officials are presumed to act in conformity with ordinances or resolutions passed by them, it does not necessarily follow that because the resolution of the board of supervisors providing that Elm Street should be abandoned except the north 20 feet thereof preserved for an alley, the south portion rather than the north portion thereof was actually abandoned. Striking proof of that fact is evidenced by the case of Calhoun v. George D. Moore, et al., not yet reported, where the board of supervisors by resolution provided for the opening of a road on the half-section line on 23rd Avenue between Indian School Road and Campbell Avenue in this county whereas in fact at that point the road veered 53 feet to the west of the half-section line and has been so used for more than thirty years.

Let it be conceded that the city survey and the Jones survey are accurate surveys of the area according to the Governmental monument located at McDowell Road and 15th Avenue. We must remember that we are not here concerned with an accurate survey of this particular area. We are concerned only with accurately ascertaining, if we can, the location of the boundary lines of Grand Avenue Subdivision according to the original plat thereof and the boundary lines of the lots and streets shown by said map or plat. It matters not how inaccurate the plat may have been or may be, property rights have vested according to that map or plat. No surveyor whether he be acting on behalf of the city or anyone else has the right to arbitrarily change

property lines or move streets from the location established by the original map or plat. The city surveyor who prepared the so-called official map of the city of Phoenix and the witness Jones wholly misconceived their duty in making their surveys of this area. The function of a surveyor in a case of this kind is not to determine where the streets or the lot lines in the subdivisions should have been according to an accurate survey but to determine where they actually were, measured by the original map or plat of Grand Avenue Subdivision. In the case of Diehl v. Zanger, 39 Mich. 601, the court said that a long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared. That certainly would apply where no survey appears to have been made as in this case and especially where said fences for all practical purposes conform with the original plat. Justice Cooley in a concurring opinion in that case said:

"Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. * * * The (city) surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. * * * The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks set by Mr. Campau, and when those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known: Stewart v. Carleton, 31 Mich. 270. As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are. * *."

The above statement of Justice Cooley is particularly apropos in the instant case. Nothing appears on the original plat to indicate either the width of lots or of streets. No governmental monuments are indicated. There is no evidence in this record that any measurement was ever taken from the Governmental monument at the intersection of McDowell and 15th Avenue in platting Grand Avenue Subdivision. There can be no justification in doing so at this time. At the time the subdivision was platted no law existed in the territory of Arizona prescribing the steps to be taken in laying out subdivisions to towns or cities. The only statute in existence at the time remotely relating to such matters was Chapter 2, section 169, Revised Statutes of Arizona of 1887 adopted in April, 1887, providing for the *platting of towns on public lands* and for dedication of streets and alleys by filing a plat thereof with the board of supervisors.

That statute was not applicable either to platting private property or to subdivisions and therefore has no application to the instant case but it is probably that it was used as a pattern in subdividing Grand Avenue Subdivision and it is further probable that the draughtsman never checked the plat with actual measurements or monuments. Under such circumstances it is easy to account for the inaccuracy of the plat with reference to Governmental monuments. Aristotle said: "We should seek such certitude in each thing as the nature of that thing allows." This is simply a concise statement of the "best evidence rule" adopted by the courts of this country in the ascertainment of certain facts upon which they can predicate judgments.

Bearing in mind that there is no evidence that an actual survey was ever made of Grand Avenue Subdivision or that any actual measurements were ever made from the Government monument at the intersection of 15th Avenue and McDowell Road and that our sole concern here is to determine if we can from the best evidence available what actually was the location of the lots in question as fixed by the plat of the Grand Avenue Subdivision, we are forced to the conclusion that their location is to be determined if at all from well-established long-standing monuments existing within the subdivision itself.

What is the best evidence in this case? Certainly the Government monument at McDowell Road cannot be treated as the best evidence of a starting point from which the actual location of the lots here involved may be accurately determined for the reason that there is no evidence that such monument was ever used as a starting point, in platting Grand Avenue Subdivision. On the other hand so far as the evidence discloses Cedar Street as it exists today is located exactly where the plat of the Grand Avenue Subdivision places it. It certainly is located exactly where the property owners in Blocks 31 and 32 by common consent have placed it since it was opened for use, some time after 1911. As stated above, if the side lines of Cedar Street were projected west they would be superimposed upon the side lines of Magnolia Street and vice versa. That is where the original plat places it. The extended side lines of a street constitute in law a permanent monument. Carey v. Clark, 40 Nev. 151, 161 P. 713. Therefore the side lines of Cedar Street are in legal effect a permanent monument in Grand Avenue Subdivision from which the location of lots in Block 31 may be definitely determined. In fact, under the best evidence rule it is the only monument from which the location of said lots according to the Grand Avenue Subdivision plat can be made. The accuracy of this monument has been confirmed by acquiescence by all of the property owners in Block 31 except Lots 8, 6, 4 and 2 thereof, and all of the property owners in Block 30 to the south of Cedar Street. This acquiescence is

clearly evidenced by location of homes on such lots and the building of fences and growing of trees along the side lines thereof for a long period of years far in excess of the statutory period required to acquire title by adverse possession. This is true as to lots on both the east and west side of Block 31 and especially directly west of Lots 8 and 6. These things were clearly visible to both parties to this litigation when they purchased the lots from Shaw. The fences along the side lines of the lots themselves may be treated as monuments. Perich v. Maurer, et al., 29 Cal.App. 293, 155 P. 471. It was said in Ralston v. Dwiggins, 115 Kan. 842, 225 P. 343, 344, that where a survey appears to conform with the recognized boundary lines of city lots on which buildings have been erected and expensive improvements made the boundaries so generally accepted and recognized for many years lend some support to the survey approved by the court; citing Tarpenning v. Cannon, 28 Kan. 665. The surveyor in that case testified that if the appellant's theory was adopted "it would move every existing improvement in town 6 feet." If appellee's survey is accepted it will move every lot line in Blocks 30 and 31 Grand Avenue Subdivision south approximately 25 to 30 feet. Such a result would be disastrous to all of said property owners were it not for the fact that they have all acquired title to the property actually occupied by them by adverse possession. The court in the Ralston case, supra, further said: "'The primary rules for locating city plats upon the ground are, in order of precedence in application, as follow: (1) Find the lines actually run and the corners and monuments actually established by the original survey. (2) Run lines from known, established or acknowledged corners and monuments of the original survey. (3) Run lines according to courses and distances marked on the plat.'" citing In re Richardson, 74 Kan. 557, 87 P. 678. The court further said in that opinion: "It is urged that the section line was the proper base line which the surveyor should have ascertained and from which his measurements and calculations should have been made. That leaves out of consideration the original survey as actually located upon the ground. A certain hedge fence is spoken of as having been used as a base line in early days, but time has erased that mark. The monuments and marks found by the surveyor furnished reasonably good evidence in locating the original survey. * * *."

We have conceded that Grand Avenue Subdivision was not accurately platted but we are bound by that plat as we find it and not by what it should be if accurately platted. We are bound by the best evidence rule which must be held to be the monuments established by the plat itself, acquiesced in and confirmed by the property owners in Block 31 as evidenced by long-established property lines.

It follows that the location of Lots 8 and 6 must be determined in accordance with the best evidence rule, that is, by measurements from monuments irrefutably established by the original plat itself as confirmed by the property owners of Block 31.

The findings of the trial court are not supported by substantial evidence. The judgment of the court should therefore be reversed and the cause remanded to that court for the purpose of determining the amount of the damage suffered by appellant, in the manner specified in Justice STANFORD'S opinion.

UDALL, Justice, (dissenting).

We consider that the decision of the majority not only does a gross injustice to the appellees but the principles of law applied to this situation, if followed, will work mischief with land titles generally. We completely disagree with both the majority opinion and the specially concurring opinion of our associates. The majority, as we view it, have by their rejection of what the trial court considered and what we deem to be the true control point, to wit: the quarter section corner on the north line of section 6, "ridden off in all directions". They are, in our opinion, like a ship at sea without rudder or compass.

The author of the majority opinion maintains that Ida Shaw (the common grantor of the parties) conveyed said lots "* * * *with reference to the north boundary line of lot 10 owned by Mrs. Newcomb* * * *" which boundary had become established by acquiescence in an old fence line. On the other hand the author of the concurring opinion maintains that "* * * *the side lines of Cedar Street* * * *" constitute the proper control monument. (Cedar Street—one block in length—while shown on the original plat of 1888 was not opened for use until the year 1911.) We maintain that both statements are predicated upon erroneous assumptions. As a matter of fact the Ida Shaw deeds in evidence specifically state, as to the description, *that the conveyance is made with reference to the plat of the Grand Avenue Addition* on record in the office of the County Recorder of Maricopa County, Book 1 of Maps, page 9. Later we shall endeavor to point out in more detail the incorrectness of these assumptions and show that the government monument, supra, should be accepted as the control point for an accurate survey. Before doing this, however, there are some general observations that may well be made.

At the outset we call attention to the fact that the sole issue involved in this case is, "Where upon the ground is the true boundary line between lots 6 and 8 of block 31, Grand Avenue Addition" ? Is it 1503 feet south of the northeast corner of the quarter section corner, as contended by appellees and as found by the court, or is it 27.35 feet north of that point, as claimed by the appellants? The only par-

ties interested in this disputed boundary line are the appellants (plaintiffs), the record owners of lot 8, and appellees (defendants) who hold title to lot 6. The judgment of the trial court was strictly confined to a determination of this issue. This judgment, had it been permitted to stand, would not have upset incorrect boundary lines between lots owned by various other parties in the neighborhood. As between property owners to the south and the west of the lots in question, acquiescence in boundary lines or adverse possession might well be the determining factor. In any event their rights are not before us for determination in this proceeding. It is our opinion that if Ida Shaw, appellants' grantor, lost title to the south portion—actually 27.35 ft.—of lot 8 it was because of the adverse claims of appellants' neighbor on the south (Mrs. Newcomb) and not by reason of any deficiency or shortage of land in said lot 8. None of the elements of adverse possession are present as between the parties in the instant suit. It would appear appellants' remedy was to sue their grantor on her warranty rather than trying to shift to the north the true boundary lines between lots 2, 4 and 6. The trial court found (and there is no evidence to the contrary): "That there were no fences, monuments or other visible markings either along the (true) boundary line between said lots 6 and 8 * * * or along the line claimed by the plaintiffs to be the boundary between said lots at the time either the plaintiffs or defendants acquired their respective lots."

We emphatically disagree with the statement in the concurring opinion to the effect that there was 207.5 feet from the north line of lot 10 to the south line of the present alley—originally a part of abandoned Elm Street—which was sufficient to give the owners of lots 8, 6, 4 and 2 each a fifty foot frontage. It is our view that the lot lines in question became fixed with the filing of the original Grand Avenue Addition plat and thereafter were immutable. The fortuitous circumstance of the abandoning of Elm Street by the board of supervisors in the year 1930—nearly a half century after the subdivision was platted—can have no bearing upon the present controversy. It certainly is a novel suggestion that the closing of a street ipso facto shifts boundary lines of lots in the area. It is to be noted that no authority is cited in support of this proposition.

We believe that the following criticism may be justly leveled at the opinions of the majority. They have in this instance, unwittingly perhaps, set themselves up as the triers of the fact. Certainly throughout they have ignored the seventeen findings of the trial court and have stated the facts in a light most favorable to an overthrowing rather than a sustaining of the judgment as well as indulged in a goodly number of unwarranted assumptions. We consider these serious departures from well

settled rules heretofore scrupulously followed by this and all other appellate courts. Estate of Taylor, 56 Ariz. 211, 106 P.2d 492.

It cannot be gainsaid that there is an irreconcilable conflict between the Holmquist survey of the area in question and the numerous other surveys thereof shown by the maps in evidence. The reason for this is obvious as different yardsticks were used. On the one hand the following surveys, to wit: (a) the Turney Map of the area (coprighted in 1908); (b) the junior subdivision known as the "F. Q. Storey Addition Plat E" (1927), covering the northeast portion of the original Grand Avenue Addition; (c) the survey made in connection with the abandonment by the board of supervisors of Elm Street (1930) and the establishment of a twenty foot alley on the north portion of said abandoned street; (d) the official map of the city of Phoenix (1938) of this subdivision (following closely the Turney map) upon which the city bases all of its paving, street lines, lot lines and assessments; and (e) the Jones survey made for the appellees, all unquestionably accept the same control point on the township line, to wit: the quarter section corner on the north line of section 6. Hence these surveys completely square one with the other. This fact is to us most significant, bringing, as we believe, irrefutable proof that the original subdivision map in 1888 was also laid out from the same control point. On the other hand Engineer Holmquist elected to ignore such monument, taking in lieu thereof his own previously established control points. In other words he made a survey of the lots as he found them to exist on the ground and not as they were deeded according to the original plat. Excerpts from his testimony will, we believe, make this point crystal clear. First as to the non-use by Holmquist of the quarter section corner as a starting point he testified on cross examination:

"Q. Now Mr. Holmquist, can you state —and I will ask you this question again— can you tell us whether or not your survey of these two blocks, 30 and 31, Grand Avenue Addition, which was shown on this exhibit, Plaintiffs' Exhibit 'C' in evidence, started from any of the quarter section corners of the Northwest Quarter of this Section 6? A. The east line of the quarter section was used as the east boundary of the block; *otherwise it wasn't passed on any certain distances from any of these corners.* (emphasis supplied)

Next as to the map (Exhibit "D") prepared by him which was primarily relied upon to establish the lot lines as contended for by appellants, we find this most revealing statement:

"Q. * * * Now tell the Court in a little greater detail as to just how you found—and upon which you based your survey as is shown by—reflected by this map. A. Well, during a number of years

I have been called on to make surveys in that portion of Grand Avenue Addition, not only these two blocks, (30 and 31) but blocks to the west. There has been a map prepared by Mr. Turney that I worked for years ago, I had a copy of that map, and I found out on investigation that that map didn't fit conditions at all, if we attempted to make surveys by that map—

"Mr. Hill: We object to this as not being responsive. The question is where did he begin from to make this survey?

"The Court: Just answer the question.

"A. I made investigations and made preliminary sketches of the map *to determine as near as possible where the lot line should be to fit fences that existed, and lines of evidence of where the lot lines were, by occupancy and so on,* and altogether it has resulted in this map, as far as these two blocks are concerned, based on what we (call) collateral evidence, * * *

"Q. Tell the different monuments that you found and used as part of your survey in determining this lot 8? A. To start with, there weren't any real monuments. The monuments were—part of them were put in by me. I don't recall these two particular blocks, *but as I would complete a survey and determine where I thought the line should be,* we would put in—we would mark points out in the middle of the street with an iron pipe, and call it a survey monument, and when we would make another survey we have base additional surveys on the same monuments." (emphasis supplied)

The Holmquist survey map has no official standing, it has never been approved by either the county board of supervisors or the city of Phoenix, nor is it filed for record with the County Recorder. It is admittedly an arbitrary plat showing conditions as *he claims they exist upon the ground.* It is our view that the original plat of the Grand Avenue Addition is controlling and not some unauthorized junior survey. We take it to be the settled law of this state that a survey based upon governmental monuments controls over one based upon unknown or private monuments. Galbraith v. Parker, 17 Ariz. 369, 153 P. 283.

Finally as to the origin of the iron stakes shown upon the Holmquist map and so greatly relied upon in the majority opinion, it is clear that they were not placed there by the original subdividers in 1887, for Mr. Holmquist testified:

"Q. But all of the iron stakes shown on this map of yours, marked Plaintiffs' Exhibit 'D', *you know you put them in yourself?* A. *Yes, sir.* (emphasis supplied)

We concede that had the lots been staked out simultaneously with the survey in 1888, and that fact could now be established, the purchasers would have a right to rely thereon even though thereafter a discrepancy was discovered. See Arnold v. Hanson, 91 Cal.App.2d 15, 204 P.2d 97.

But that is a far cry from the facts in the instant case where the stakes were admittedly placed by Mr. Holmquist some three decades after the subdivision was platted.

The hiatus or squeeze play resulting from the impact of these conflicting surveys, Jones and Holmquist, amounting to about half the width of a lot (actually 27.35 feet) becomes manifest with the instant controversy. If the Holmquist map is accepted the lot lines are shifted north by that distance and defendants' new brick residence is partially upon appellants' ground. On the other hand if what the trial court considered to be the true measurement is adopted then the appellees have the land called for in their deed and decreed to them by the judgment of the trial court.

In the specially concurring opinion it is stated as a fact: "* * * The plat (official plat of Grand Avenue Addition) further shows that Cedar Street * * *, if projected, the side lines thereof would be superimposed upon the side lines of Magnolia Street to the west of Grand Avenue." yet, Engineer Harry E. Jones, whose testimony was evidently accepted by the trial court, testified on cross examination directly to the contrary. We quote:

"Q. Now showing you the photostatic copy of the official recorded map, I will call your attention to Cedar Street and Magnolia. A. Yes, sir.

"Q. They line up together, do they? A. No.

"Q. It appears to be so, does it not? A. Well, an optical illusion, but they actually don't for the simple reason that these blocks lying west of Grand Avenue were spaced off, beginning from the south line of the northwest portion, the blocks lie on the northeast side of Grand Avenue and were spaced off beginning at McDowell Road. Those streets, while they may appear to come to a common intersection of Grand Avenue, actually they don't.

"Q. In other words, what it shows here Magnolia and Cedar Street running through there is an optical illusion? A. They don't exactly coincide. Neither does Elm Street coincide exactly with Spruce Street west of Grand Avenue.

Even though other evidence in the record, such as a visual inspection of the Dyer map made in 1887, might be somewhat in conflict therewith, we might ask: have we become the triers of the fact? Under this state of the record can it be properly said that "the side lines of Cedar Street are in legal effect a permanent monument * * * from which the location of lots in block 31 may be definitely determined."? Our answers to both queries are, of course, in the negative.

We agree with the majority that the controlling plat in the instant case is that of Grand Avenue Addition (1888) which plat comprises *all* of the Northwest Quarter

of Sec. 6, Twp. 1 N. Range 3 E. of the G. & S. R. B. & M. Unfortunately the official map, other than stating it is drawn to a scale of 300 feet to an inch, is without original scale dimensions. That omission, however, is for our purposes supplied by the admission of all parties that the lots in blocks 30, 31, 32 and 33 (on the east side of the subdivision) as shown on the plat are fifty feet in width (except lot 15, block 30) and the streets shown thereon have a width of sixty feet, plus 33 feet for the south half of McDowell Road. With these dimensions conceded no uncertainty remains, hence we may invoke the rule stated in 8 Am.Jur., Boundaries, Sec. 6: "* * * It is a general rule that a description of premises is deemed certain if it may be made certain. * * *"

Furthermore, we find it to be the law that: "* * * whenever a deed describes property by reference to a plat or map, the grantor is considered as having adopted the plat or map as a part of the deed, and the grantee takes title in accordance with the boundaries so identified. * * * An allotment made by reference to a plan which indicates with certainty the location of every lot, although none of the boundary lines may have been actually run or located, will be sufficient if the lots can be surveyed and made certain; * * *." 8 Am.Jur., Boundaries, Sec. 8.

We challenge the correctness of the oft repeated statements of the majority to the effect that the Grand Avenue Addition was not originally surveyed or platted with reference to governmental corners on the exterior lines of section 6, and more particularly with reference to the quarter section corner on the north at the intersection of what is now McDowell Road and Fifteenth Avenue. As a matter of fact the majority are in disagreement among themselves as to this matter of an original survey—Justice STANFORD stating: "* * * It further appears from the evidence that the *monuments from which the original survey was made* cannot be accurately located. * * *" (Emphasis supplied) whereas Justice Phelps in the specially concurring opinion holds that: "So far as the evidence in this case discloses *there was never made an actual survey of Grand Avenue Addition,* * * *." (Emphasis supplied)

Obviously both cannot be right. It seems to us that the latter statement is completely refuted by the dedication appearing upon the face of the original recorded plat of the subdivision, which reads in part: "This plat of the lots, streets and alleys *is hereby published as the complete plan and survey thereof,* and the said streets and alleys upon the recording hereof in the County Recorder's office are dedicated to the public for their use limited as herein set out. * * * (emphasis supplied)

Indicative of the ancientness of this plat is that it limited the use of Grand Avenue *"to light vehicles and such as are drawn by not more than two animals."* Would the majority have us believe that the official

plat showing in great detail more than a dozen streets (including more than two-thirds of a mile of Grand Avenue), 33 blocks and more than 700 lots which occupy all of the NW¼ of Sec. 6, was made with no established control points? The idea to us is preposterous. In 11 C.J.S., Boundaries, § 104 a (3) it is said:

"* * * It is not to be presumed that a surveyor knowingly made a description for lands which would be impossible to run out according to any recognized rules of surveying. * * *

* * * * * *

"* * * In the absence of evidence to the contrary, it will be presumed that the surveyor actually went on the ground in locating his lines, and corners, * * *."

We agree with Justice STANFORD that an original survey was made of this subdivision but emphatically disagree, for the reasons hereinafter stated, that the monuments from which the original survey was made cannot now be accurately located. From the maps in evidence it appears that the government quarter section corner is now marked by a cross in the pavement at the McDowell intersection. Both engineers, Jones and Holmquist, confirmed this fact. The latter testified on cross examination:

"Q. Now have those quarter section corners of the Northwest Quarter of 6, Township 1 North, Range 3 East, have they always been marked? A. Well, it has been marked ever since I have been in Phoenix.

"Q. How long is that? A. About 38 years.

"Q. *And there is no dispute over those quarter section corners?* A. *Not that I know of.*" (emphasis supplied)

We may safely take judicial notice that the government survey of the township in question (which always includes the establishment of section and quarter section corners on the external bondaries of each section) was made prior to the time when the Grand Avenue Addition plat was filed as reference is thereon made to a legal subdivision of a surveyed section viz: NW¼, Sec. 6, T. 1 N., R. 3 E. Furthermore there is considerable sanctity to these monuments for it has always been a federal offense to destroy, change or remove to another place any section or quarter section corner on any government line of survey. See Sec. 1858, 18 United States Code Annotated.

The majority of the court, in reversing the judgment, is placed in this embarassing dilemna. They have two, nay three, control points from which they say the surveyor may proceed i. e., the Newcomb "partition fence" between lots 8 and 10, or the "side lines of Cedar Street"—take your choice—which govern (as they maintain) the east-west boundary lines between the lots. Yet in determining the equally important north-south line, being the east boundary line of the lots in question. Engineer Holmquist—upon whom, from an engineer-

ing standpoint, appellants' case rests—adopted as the third control point the identical quarter section corner now rejected by this court as being non-controlling. We quote excerpts from his testimony:

"Q. Now what other monuments did you tie into? A. The north quarter corner of the section for the same purpose.

"Q. The north quarter corner of the section? A. You might call that the northeast corner of the North west Quarter.

"Q. The northeast corner of the Northwest Quarter, that is the one at the center of McDowell? A. Yes, sir.

"Q. You tied into that on your survey? A. Tied into that line, yes, sir, the line connecting those two points.

"Q. I understood you to say you didn't go that far with your survey. A. You had to get that line to get the east boundary of the blocks.

"Q. And did you tie in then to the quarter corner up there. A. I don't recall whether I measured up there or not. We used this as a line. * * *"

We contend that if this monument was valid for such purpose it was valid for all purposes. In a situation of this kind there can be but one control point, not two or more conflicting ones.

Obviously the trial court took the view, and so do we, that in examining and construing the official plat of Grand Avenue Addition covering all, not a part, of the northwest quarter of said section 6, the only legal inference to be drawn therefrom was that the subdivision conformed to the governmental survey of the area and that therefore the quarter section corner was the one and only controlling monument from which disputed boundary lines could properly be determined.

Part of our difficulty can be resolved if the question as to who carries the burden of proof on this original monument matter is analyzed. It seems to be the view of the majority that it was incumbent upon the appellees (defendants) to affirmatively establish—after a lapse of 59 years, with participants probably all dead—that when the Grand Avenue Addition plat was prepared that it was laid off and measurements were taken from the governmental quarter section corner on the north line of section 6. We deny this premise and point out that appellants were the plaintiffs in the court below and hence the burden was upon them of showing that the government survey corners had been moved in the interim or that the subdivision was not laid out in accordance with the official survey of said section 6. From 11 C.J.S., Boundaries, § 104(b), Burden of Proof, these excerpts are taken:

"* * * proof of a change of boundary is on the party asserting that fact * * *.

* * * * * *

"As to surveys. One claiming under a survey, *or disputing the accuracy of a sur-*

vey, has the burden of proving the truth of his contention. * * *"

As a matter of fact this precise narrow question came from the fertile minds of our associates as it was not made an issue in the lower court and no testimony either pro or con appears in the record.

As an abstract proposition we have no quarrel with the principle of law announced in Silsby & Co. v. Kinsley, supra, relied upon the majority, to the effect [89 Vt. 263, 95 A. 638]: "The actual location upon the ground of original lot lines will control, if capable of being ascertained; but, when such lines have never been surveyed or, if surveyed, their location upon the ground cannot be ascertained, resort may be had to the lines of adjacent lots to determine their location."

It is our position that under the law and the facts of this case as we have detailed them this principle of law has no application for the reason that the surveyors are able to definitely fix the true monument from which the original survey of Grand Avenue Addition was made and thus ascertain the true location upon the ground of said lots. In other words, as we view it there are no lost, obliterated or destroyed monuments to deal with in this case. There is no occasion therefore for us to analyze the various cases cited by the majority.

It is our view that under the record of this case it may be conclusively presumed —there being no evidence to the contrary— that the Grand Avenue Addition was laid out in accordance with the government survey of the area which it embraces. If we are correct in this conclusion that the government quarter section corner is the proper control point for an accurate survey then it indubitably follows the trial court was correct in finding in effect that: (1) it was precisely 1503 feet south from this established corner to the true boundary line between lots 6 and 8; (2) the Jones survey of the boundaries of appellees' lot 6 is correct; and (3) no portion of the six room residence appellees erected thereon encroaches upon appellants' lot 8. It is now conceded by the court's majority, at least we so interpret their statements that the Jones survey was correct if the government monument controls, and hence we shall not labor the point by marshalling the evidence which so overwhelmingly establishes the correctness of the trial court's findings in this regard.

To accept the decision of the majority in its full import will cast grave doubt upon, (a) the accuracy of the survey of all lots lying north of lot 10, block 31, Grand Avenue Addition, (b) the validity of the paving and other assessments levied by the City of Phoenix in the area, and (c) the abandonment of Elm Street and the establishment of the alley way therein.

For the reasons herein stated we would affirm in all particulars the judgment of the lower court.

DE CONCINI, J., concurs.